

## **Decision of the European Ombudsman on complaint 1137/2005/(OV)ID against the European Central Bank**

Decision

**Case 1137/2005/(OV)ID - Opened on 06/04/2005 - Decision on 11/12/2007**

Strasbourg, 11 December 2007

Dear Mrs P.,

On 17 March 2005, you submitted a complaint to the European Ombudsman, against the European Central Bank ("ECB"). Your complaint concerned the ECB decision to reject your bid for translation and terminology services.

On 6 April 2005, I opened an inquiry into your complaint and invited the ECB to submit its opinion on it. The ECB sent its opinion on 19 July 2005. I forwarded it to you with an invitation to make observations, which you sent on 27 September 2005.

By letters dated 14 November 2005, 15 December 2005 and 23 May 2006, I requested further information from the ECB about your case. On 12 January 2006 and on 28 June 2006, the ECB sent to me its additional opinions. By letters dated 29 June 2006 and 31 January 2007, you made observations on these opinions.

On 16 February 2007, I sent to the ECB a friendly solution proposal regarding your complaint. On 16 April 2007, the ECB proposed to you a draft settlement agreement and sent the relevant document to me. By letter dated 28 June 2007, you informed me of your decision not to accept the ECB's proposal and made a number of remarks in this regard. I forwarded your letter to the ECB, which sent to me its comments on 30 August 2007.

I am now writing to inform you of the result of the inquiries I have made into your complaint.

### **FACTUAL BACKGROUND AND SUBJECT MATTER OF THE OMBUDSMAN'S INQUIRY**

On 14 July 2004, the ECB's Translation Division notified the complainant that it was launching a restricted tender procedure (a "three-quote procedure", pursuant to the ECB's Administrative Circular 8/2003) for the award of framework contracts for the provision of English-Greek translation and terminology services. The complainant was invited to complete a questionnaire



and offer a price for the tendered services which included both remote work as well as work on the ECB's premises. The invitation stated that " *[t]he contract(s) will be awarded to the provider(s) which show the best capability to cover our structural needs comprehensively and at competitive rates* ". The complainant sent back, within the deadline, the requested documents and her CV. On 5 November 2004, the Translation Division informed the complainant that her offer had not been retained and that she was not among the three successful service providers with whom the Bank was going to conclude framework contracts for the period November 2004 - November 2006.

By letter of 24 November 2004, the complainant asked to be informed of the detailed criteria on the basis of which the bids had been assessed, namely, quality, total cost (that is, offered price plus eventual travel and accommodation costs) and any other, as well as of the respective weight of these criteria in the rating of the bids. The complainant also asked to be informed of the assessment made of the quality of her bid and of the overall rating it received. The Translation Division replied on 18 January 2005, stating that the assessment criteria for the bids were the following six: (i) quality of services, (ii) reliability, (iii) flexibility, (iv) availability, (v) previous experience, and (vi) other, namely, motivational, interpersonal and work-method related (CAT tools, analytical skills). Equal weight was assigned to each of these criteria and a mark ranging from one to three was awarded to each of them. The letter stated that the complainant's overall score was 12/18, without however specifying the points awarded in relation to every specific criterion. The reasons why the complainant's score was slightly lower than those of the selected bidders were (i) the complainant's (alleged) relatively lower level exposure to the full range of ECB-specific projects and (ii) her (alleged) lack of experience in handling stand-alone projects from inception through to completion. As regards the cost element mentioned by the complainant in her letter, the Translation Division replied that the highest weight was assigned to the rate charged for work on the ECB's premises, since this represents around 75% of the Bank's actual needs.

On 17 March 2005, the complainant lodged a complaint with the Ombudsman about this matter. By letter dated 6 April 2005, the Ombudsman opened an inquiry into (i) the complainant's allegation that the assessment criteria of the bids used by the Translation Division - as specified in the letter of 18 January 2005 - were not in conformity with the applicable legislation and breached the principle of good administrative behaviour; and (ii) the complainant's claim that her bid should be reassessed and that the classification of the six bidders should be revised accordingly.

## **THE INQUIRY, THE OMBUDSMAN'S FRIENDLY SOLUTION PROPOSAL AND SUBSEQUENT DEVELOPMENTS**

In the context of the present inquiry, the complainant made a number of arguments in support of her allegation. In view of this argumentation, the Ombudsman made extensive inquiries into the case. The following presentation is limited to the elements which have been considered as most relevant for the purposes of reaching a decision on the complainant's allegation.



In the context of further inquiries, the Ombudsman invited the ECB, inter alia, to address, in the light of the principle of transparency, the complainant's additional argument (made in her observations dated 27 September 2005) that " *the invitation to tender suggested that the two components of the award criterion [ comprehensive coverage of the Bank's needs and coverage at a competitive rate ] would carry equal weight and that the application of different coefficients to the two components should have been indicated in the invitation.* " The Ombudsman also asked the ECB to specify what kind of coefficients it applied in this regard.

Relatedly, it must be noted that, on the basis of the numerical data provided in the ECB's second opinion (dated 12 January 2006), the selected bids were considerably more expensive than the complainant's bid (50% as regards "work on ECB premises" and more than 100% as regards "translation", "editing/proofreading" and "terminology work") (1) . In this regard, the complainant, in her letter of 29 June 2006, referred to the following passage in the ECB's procurement rules (Administrative Circular 8/2003), applicable here: " *The ECB seeks cost-efficiency in its procurement policy. (...) [ The ECB seeks ] to obtain the best possible value for money from the procurement of ... services (...). Value for money is understood as the best combination of price, life-cycle costs (including internal costs), quality and fitness for purpose for the ECB's needs* ". The complainant went on to remark, in particular, that the ECB's evaluation panel completely set aside the cost component and focused exclusively on the qualitative award criterion.

In reply to the Ombudsman's invitation referred to above, the ECB stated the following in its third opinion, dated 28 June 2006:

" *Administrative Circular 08/2003 on the ECB Procurement Rules (hereinafter 'ACP') does not contain an obligation to communicate the weighting of award criteria. Accordingly, the ECB is of the view that it was under no obligation to communicate the weighting of the components of this particular case. The ECB admits, however, that it would have added to the transparency of the procedure if the weighting had been communicated to the bidders ex ante and will consider including the weighting of the award criteria in future three-quote procedures to the extent feasible.*

*With regard to the coefficients for the different components of the award criteria, the ECB wanted to emphasise the importance of the 'best capability to cover the structural needs comprehensively' criterion. Accordingly, each one of the six subheadings of this criterion was awarded equal weight. There was no coefficient established for the criterion 'competitive rates'; what was assessed was whether in the light of the assessment of the first criterion, the prices could possibly offset the lower points awarded for the 'best capability to cover the structural needs comprehensively' criterion. **The ECB submits that it should have specified the points to be awarded for the prices of the different types of services requested, to make the procedure more transparent and enable its impartiality to be reviewed** and has adjusted the procedure to ensure that coefficients are applied to all award criteria in future three-quote procedures. The ECB also reviewed the complainant's offer under the new system, but came to the conclusion that the overall results remained unchanged. As a result of this review, the ECB's*



*earlier decision to award the contract to the three successful bidders was confirmed. In the aim of increasing transparency for the future, the ECB has put in place arrangements to ensure that a similar case will not occur again in the future. " (emphasis added).*

In her observations on the above part of the ECB's third opinion, the complainant rejected the Bank's relevant argumentation. She considered that there had been a violation of the principles governing public procurement, ECB's Administrative Circular 8/2003 and the provisions of the call for tenders. As regards the review of her offer under the new system, referred to in the ECB's opinion, she noted that (a) the ECB had not made known the "new system" and the modalities of the new evaluation of her tender; (b) since this "new system" had not been communicated to the tenderers at the time of the submission of the bids and since this evaluation involved only her bid and not the bids of the successful tenderers, the ECB's relevant argument was devoid of legal significance. She also pointed out that the ECB's unfair behaviour had caused her substantial financial damage.

After taking into account the above, and on the basis of a reasoned analysis of the relevant issues, the Ombudsman considered that the award procedure and decision at issue appeared to constitute an instance of maladministration. He, thus, proposed to the ECB a friendly solution to the complaint. More specifically, he suggested to the ECB to consider offering reasonable compensation to the complainant.

Following this suggestion, the Bank's services held a meeting with the complainant, subsequent to which the ECB addressed to her a proposal for financial compensation and invited her to sign a (draft) settlement agreement. In its proposal, the ECB explained how it had calculated the amount offered to the complainant. Subsequently, the complainant informed the Ombudsman that she did not accept the ECB's proposal. She went on to state that she considered that the way the ECB had calculated the amount it offered to her was not fair and did not result in a "reasonable" compensation. She also presented her views about how this compensation should be determined. The Ombudsman forwarded the complainant's letter to the ECB, which maintained the positions expressed in its amicable settlement proposal it had addressed to the complainant.

Hence, it seems that both parties accepted that the instance of maladministration found by the Ombudsman could be eliminated through the award of reasonable compensation to the complainant. Nevertheless, they did not reach an agreement as regards the amount of such compensation, because of their differing views on the criteria to be used in determining the amount of compensation. It follows that a friendly solution to the complaint has not been achieved.

## THE DECISION

### **1 Allegation that the assessment criteria of the bids were not in conformity with the applicable rules and principles, and relevant claim**

1.1 The complaint concerns the decision of the ECB to reject a bid submitted for translation and terminology services submitted by the complainant. The Ombudsman inquired into (a) the



complainant's allegation that the assessment criteria for the bids were not in conformity with the applicable rules and principles of good administration; (b) her claim that her bid should be reassessed and that the classification of the six bidders should be revised accordingly. In support of her allegation, the complainant argued, inter alia, that " *the invitation to tender suggested that the two components of the award criterion [ comprehensive coverage of the ECB's needs and coverage at a competitive rate ] would carry equal weight and that the application of different coefficients to the two components should have been indicated in the invitation.* "

In its reply to the foregoing argument, contained in its opinion dated 28 June 2006), the ECB stated the following: " *There was no coefficient established for the criterion 'competitive rates'; what was assessed was whether in the light of the assessment of the first criterion, the prices could possibly offset the lower points awarded for the 'best capability to cover the structural needs comprehensively' criterion. The ECB submits that it should have specified the points to be awarded for the prices of the different types of services requested, to make the procedure more transparent and enable its impartiality to be reviewed.* "

The Ombudsman's relevant friendly solution proposal was based on the following considerations.

1.2 The principle of equal treatment of tenderers, which is a general principle of Community law (2) , means, first of all, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority (3) . More specifically, that means that (a) the award criteria will not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract and (b) when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers (4)

1.3 The principle of equal treatment of tenderers also implies an obligation of transparency, in order to enable verification that this principle has been complied with (5) . An appropriate level of transparency is, thus, required (6) , with a view to preserving both the appearance and the reality of fairness in the work and decisions of the contracting authority and to facilitating review of the impartiality and integrity of the procurement procedures.

The above requirement means, inter alia, that the award criteria stated in a tender notice (or similar document, such as an invitation to specific persons for submission of bids, in the context of a restricted tender procedure) must be formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way (7) .

Furthermore it implies that the relative importance (weighting) of the award criteria to be taken into account by the contracting authority in identifying the economically most advantageous offer must be specified in the tender notice (or similar document or tender documents referred to in the tender notice), at least where: (i) the decision on this matter has been made at the time of the issuance of the call for tender (or of the relevant tender documents referred to in the tender notice) (8) ; or (ii) the decision on this issue contains elements which, if known at the time the tenders were prepared, could have affected that preparation (9) . Moreover, the decision on this



subject will not be compatible with Community law, if it is adopted after taking into account elements, or, more generally, in circumstances, likely to give rise to discrimination against one of the tenderers (10) .

1.4 The Ombudsman does not exclude the possibility that the relative importance of the qualitative award criterion and the cost award criterion (to be taken into account by the contracting authority in identifying the economically most advantageous bid) may permissibly, under the Community law and principles of good administration, be unspecified in the contract notice (or similar document). Nevertheless, even on the basis of this assumption, the weighting of the qualitative award criterion and the cost award criterion, must, at least, be determined before the opening and evaluation of the bids. Otherwise, the fairness of the whole procedure is substantially undermined, since its outcome can be easily manipulated. In any event, the determination of this weighting after the completion of the evaluation of the parts of the bids pertaining to the qualitative award criterion and after the opening of the parts of the bids referring to the cost award criterion is clearly incompatible with the need to ensure both the appearance and the reality of fundamental fairness in the award procedure, and breaches the principles of equal treatment and transparency in this context.

1.5 On the basis of the information provided by the ECB in its letter of 28 June 2006 to the Ombudsman, these requirements were not respected in the context of the tender procedure here concerned. Indeed, as the ECB stated, "*[t]here was no coefficient established for the criterion 'competitive rates'; what was assessed was whether in the light of the assessment of the first criterion, the prices could possibly offset the lower points awarded for the 'best capability to cover the structural needs comprehensively' criterion.*" (11)

This means that the contracting authority did not determine this weighting even before the award decision was made, but rather, in what seems to be an exercise in unbridled discretion in determining the outcome of the award procedure, it simply considered that, in the light of the assessment of the qualitative award criterion, the prices could not possibly offset the lower points awarded for the qualitative award criterion. In light of the above, the Ombudsman considers that the award procedure and decision at issue involved an instance of maladministration corresponding to the complainant's allegation (12) .

1.6 In its letter dated 28 June 2006, the ECB also admitted that "*it should have specified the points to be awarded for the prices of the different types of services requested, to make the procedure more transparent and enable its impartiality to be reviewed*". Relatedly, the Ombudsman welcomes the ECB's initiative, referred to in the same letter, "*to adjust the procedure to ensure that coefficients are applied to all award criteria in future three-quote procedures.*" (13) The Ombudsman will make a relevant further remark below.

1.7 In its letter of 28 June 2006, the ECB went on to say that its re-examination of the complainant's bid "*under the new system*", led to the conclusion "*that the overall results remained unchanged*" (and, hence, to the confirmation of the award decision). As the Ombudsman has already noted in his friendly solution proposal, this measure cannot, in any event, remedy the illegality of the award procedure and decision, which appear to be





fundamentally and irrevocably flawed, in view of the nature of the foregoing instance of maladministration.

1.8 Taking into account his remarks in points 1.4 and 1.5 above and also the fact that, as mentioned in the ECB's letter of 5 November 2004 to the complainant, the relevant framework contracts had been concluded for the period November 2004 - November 2006, the Ombudsman did not consider it appropriate to propose a friendly solution along the lines of the complainant's claim. The Ombudsman, thus, suggested to the ECB to consider offering reasonable compensation to the complainant.

1.9 Following this suggestion, the ECB's services held a meeting with the complainant, subsequent to which ECB addressed to her a letter dated 16 April 2007. In this letter, the ECB (a) informed the complainant about the particulars of the revised procedure referred to in point 1.6 above and stated that its re-examination of the bids on the basis of this procedure confirmed its initial award decision; (b) maintained its position that the tender procedure was carried out in line with its Procurement Rules and the general principles of procurement law; (c) stated that it was, nevertheless, willing to follow the Ombudsman's friendly solution proposal, without acknowledgement of any legal obligation; (d) noted that it could not treat the complainant equally with the successful bidders; (e) concluded that, in the absence of any concrete tangible identified damage, it suggested offering her compensation for the time and effort spent by her on addressing with the European Ombudsman the procedural flaw in the procurement procedure, as well as for assumed extra costs; (f) proposed a settlement agreement, specifying the amount of compensation offered to the complainant and the methodological basis for its calculation.

Subsequently, the complainant informed the Ombudsman that she did not accept the ECB's proposal. She considered that the way the ECB had calculated the amount it offered to her was not fair and did not result in a "reasonable" compensation. She argued that this compensation should be determined on the basis of the aggregate hours during which the ECB had actually employed the three successful candidates. The Ombudsman forwarded the complainant's relevant letter to the ECB, which maintained the positions expressed in its amicable settlement proposal it had addressed to the complainant.

1.10 The Ombudsman notes that the complainant refers in essence to damage she has suffered owing to the flawed tender procedure and to the loss of the opportunity to be awarded a framework contract for translation and terminology services following this procedure. In such cases, where there has been an infringement of Community law in the carrying out of a tender procedure, the Court of First Instance has consistently held that the award of damages due to a loss of profit presupposes that the applicant was entitled to be awarded the contract; if there is no certainty that the tenderer would have been awarded the contract in the absence of the Administration's unlawful behaviour, the loss of the chance of securing the contract cannot be regarded as real and certain damage that triggers the Community's non-contractual liability (14). On the basis of this case-law (15), the complainant's above argument regarding the calculation of a "reasonable" compensation in the present case and challenging the relevant assessment made by the ECB does not appear to be well-founded. Indeed, taking into account



the nature of the flaw of the tender procedure identified by the Ombudsman (see points 1.5 and 1.7 above), and independently of the discretion that the ECB enjoyed in the evaluation of the bids, it cannot be established with certainty that the complainant should have been awarded the contract, in the absence of this flaw.

The Ombudsman also recalls his finding that the tender procedure in question appears to be fundamentally and irrevocably flawed, in view of the nature of the instance of maladministration found in point 1.5 of the present decision. For this reason and independently of the fact that the relevant framework contracts have been concluded, and of whether they have expired, acceptance of the complainant's claim for a reassessment of the bids would not lead to a satisfactory remedy and is not upheld.

1.11 In view of the above, the Ombudsman will close the case with a critical remark.

## **2 Conclusion**

On the basis of his inquiries into the present complaint, the Ombudsman makes the following critical remark:

*The tender procedure and award decision at issue were not compatible with the principles of fairness, equal treatment and transparency set out in point 1.4 of the present decision, concerning the determination of the weighting of the qualitative award criterion and the cost award criterion. This was an instance of maladministration.*

The Ombudsman, thus, closes the case.

The President of the ECB will be informed of this decision.

## **FURTHER REMARK**

The Decision of the ECB of 3 July 2007 laying down the Rules on Procurement (ECB/2007/5) (16) provides, inter alia, that " [w]here the award is made to the most economically advantageous tender, the ECB shall specify in the contract notice or in the invitation to tender [...] the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender. " (17) The Ombudsman welcomes the enactment of this rule, which reflects the principles of fairness, equal treatment and transparency referred to in points 1.2-1.4 of the present decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) According to the table containing these data, the marks for the criterion concerning the 'best capability to cover the structural needs comprehensively' were as follows: 17 for the first





successful bidder, 17.5 for the other two successful bidders and 12 for the complainant. The table also contained a breakdown of these marks.

(2) See Case C-57/01 *Makedoniko Metro* [2003] ECR I-1091, paragraph 69.

(3) See, e.g., Case C-448/01 *Evn and Wienstrom* [2003] ECR I-14558, paragraph 47.

(4) Case C-448/01 *Evn and Wienstrom* , cited above, paragraphs. 37 and 48.

(5) Case C-448/01 *Evn and Wienstrom* , cited above, paragraph 49.

(6) Cf. Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 61.

(7) See Case C-19/00 *SIAC Construction* [2001] ECR I-7725 paragraph 42.

(8) Cf. Case C-470/99 *Universale Bau* [2002] ECR I-11617, paragraphs 90-100.

(9) Cf. Case C-331/04 *ATI EAC* [2005] ECR I-10109, paragraphs 24, 28 and 29.

(10) Cf. C-331/04 *ATI EAC* , cited above , paragraphs 24, 30 and 31.

(11) In its letter dated 30 August 2007 to the Ombudsman, the ECB stated that the coefficients were established prior to the opening of the bids. However, the ECB did not provide any specific information and documentation in support of this statement, which is obviously incompatible with the quote passage from its letter of 28 June 2006.

(12) In view of this finding, the nature of the instance of maladministration identified and his relevant remark in point 1.7 below, the Ombudsman does not consider it justified to examine the other arguments put forward by the complainant, in support of her complaint.

(13) To its letter of 16 April 2007 to the complainant, which it communicated to the Ombudsman, the ECB annexed a document referring to the "adjusted procedure," including to the weightings applicable to the qualitative award criteria and to the cost award criterion.

(14) See e.g., Case T-203/96 *Embassy Limousines & Services v Parliament* [1998] ECR II-4239, paragraph 96; Case T-160/03 *AFCon Management Consultants and Others v Commission* [2005] ECR II-981, paragraphs 112-114; order in Case T-140/04 *Ehcon v Commission* [2005] ECR II-3287, paragraphs 75-77.

(15) The approach of the CFI does not seem to be the same in staff cases. See, in particular, the opinion of 22 November 2007 of Advocate General Mengozzi in Case C-348/06 P *Commission v Girardot* [not yet published in the ECR], paragraphs 56 *et seq* .

(16) OJ 2007 L 184, p. 34.



(17) See Article 26(2)(b).