

## **Decision of the European Ombudsman on complaint 2989/2006/OV against the European Parliament**

Decision

**Case 2989/2006/OV - Opened on 08/11/2006 - Decision on 16/07/2008**

Strasbourg, 16 July 2008

Dear Mrs V.,

On 16 August 2006 (1) , you submitted a complaint to the European Ombudsman against the European Parliament concerning the tender procedure for the attribution of the external management of Parliament's Wayenberg Crèche.

On 8 November 2006, I forwarded the complaint to the President of Parliament. Parliament sent the English original of its opinion on 20 February 2007 and a translation into Dutch on 28 February 2007. I forwarded it to you with an invitation to make observations, which you sent on 7 May 2007.

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

I would like to apologise for the length of time it has taken to deal with your complaint.

### **THE COMPLAINT**

The complainant in this case, namely, bvba Kidcare, is a Belgian company. Since 1993, and following successive tender procedures, the complainant had managed the Eastman Crèche (2) of the European Parliament. According to the complainant, the relevant facts of the case are as follows:

On 4 February 2005, Parliament published an invitation to tender for a contract for the external management of its Wayenberg Crèche (3) in Brussels (2005/S 25-023466). The complainant participated in the tender procedure and made an offer. The evaluation criteria foresaw that the tender would be awarded to the economically most advantageous offer evaluated on the basis of the following criteria in decreasing order:

(a) the value of the pedagogical project (40 points);



(b) the methods of management, organisation and implementation of the project, the employment policy, the recruitment and management of human resources, as well as the measures taken in order to ensure the stability and the personnel's high level of qualifications (30 points);

(c) the total price for 180 children per month (30 points).

On 27 October 2005, Parliament's Directorate-General ("DG") Personnel informed the complainant that its tender had not been retained. Parliament indicated that the reasons for the rejection were the following:

- the pedagogical project was interesting but too theoretical, leaving uncertainties as to its application;
- the methodology for the management and organisation appeared to be correct but incomplete for a crèche of 180 children.

On 9 November 2005, the complainant wrote to Parliament in order to obtain additional information concerning the rejection of its tender. On 17 November 2005, Parliament replied stating that the tender of the firm R. had been retained. As regards the complainant's tender, Parliament explained that the following aspects had led to a lower mark:

- the tender as presented appeared too theoretical and not sufficiently convincing;
- Parliament noticed that insufficient consideration had been paid to the project of the Wayenberg Crèche in comparison to the Eastman Crèche;
- the tender showed a lack of formal internal communication between the different intervening parties, as well as an absence of sufficient resources for the potential replacement of personnel.

On 29 November 2005, the complainant again requested an explanation, pointing out that the above three arguments developed by Parliament were vague and that they were based on a personal assessment and not on evaluation of award criteria.

On 9 December 2005, Parliament replied, without however providing further explanations. After this letter, the complainant decided to stop the correspondence.

On 16 August 2006, the complainant made the present complaint to the European Ombudsman. The complainant subdivided its complaint in three sections, namely, "the complaint", "the argumentation" and "the claim". In the section concerning the argumentation, the complainant argued that the information communicated to it was (1) vague, (2) not unequivocal, (3) based on a purely subjective appraisal, (4) incomplete and (5) incorrect.

The complainant developed each of these points as follows:



- The information communicated was *vague* , because, for instance, in the case of the most important evaluation criterion (namely, the value of the pedagogical project), Parliament rejected the complainant's tender merely with two vague phrases, stating " *le projet pédagogique est intéressant mais trop théorique laissant apparaître des incertitudes quant à son application concrète* " (letter of 27 October 2005) and " *[l]e projet pédagogique a été jugé intéressant* " (letter of 17 November 2005).

- The information communicated was *not unequivocal* , because in the letter of 27 October 2005, the pedagogical project was considered as too theoretical, whereas in the letter of 17 November 2005, the whole offer was considered as too theoretical (" *[l]'offre telle que présentée est apparue trop théorique et pas suffisamment convaincante* "). The complainant argued that a similar change in the reasoning was also adopted with regard to the criterion concerning the replacement of personnel: In the letter of 17 November 2005, Parliament stated that " *le projet présenté a fait ressortir (...) l'absence d'un éventail de sources suffisantes pour les remplacements éventuels du personnel* ". This was not consistent with the subsequent clarification in the letter of 9 December 2005 that " *la nature des solutions proposées dans l'offre de Kidcare [ that is, the complainant ] ne prenait pas suffisamment en compte la taille du projet* ".

- The information communicated was *based on a purely subjective appraisal* , because words like " *convaincante* " are the expression of a personal assessment rather than of an objective evaluation.

- The information communicated was *incomplete* , because with regard to the second evaluation criterion, Parliament did not comment on the complainant's employment policy, management of human resources, stability and qualifications of personnel.

- The information communicated was *incorrect* , because the reference, in Parliament's letter of 9 December 2005, to the fact that the complainant merely proposed a part-time director for 180 children, was in contradiction with the complainant's offer which foresaw a directing team of three persons (full-time office manager/administrative officer, full-time pedagogical co-ordinator, and part-time general director). Also, Parliament's letter of 17 November 2005 mentioned that there was a lack of formal internal communication, which was in contradiction with various points mentioned in the complainant's offer about several kinds of internal meetings.

In the section entitled "the claim", the complainant stated that the elements described above in the "argumentation" section might indicate that Parliament illegally awarded the contract to the firm R., and that, on the basis of further information, it would decide whether to make a further complaint about unfair treatment and the violation of its interests.

On the basis of the above, the complainant made two *allegations* and one *claim* in its complaint to the Ombudsman:

- Parliament has refused to communicate clearly and concretely to the complainant the relative advantages of the offer retained for the management of its Wayenberg Crèche.
- Parliament should provide the complainant with this information.



- Contrary to the requirement of Article 19 of the European Code of Good Administrative Behaviour, Parliament failed to indicate to the complainant the possibilities of appeal.

## THE INQUIRY

### Parliament's opinion

In its opinion, Parliament made, in summary, the following remarks:

#### *(1) Facts and background*

Following an invitation to tender, the contract for the management of the Wayenberg crèche was awarded to the firm R. This was done by decision of the Authorising Officer of 27 October 2005. On the same day, the Authorising Officer informed the complainant that its tender had not been accepted, setting out in summary form the reasons for the tender's rejection.

By letter of 9 November 2005, the complainant requested " *additional information on the reasons for the rejection of the tender* ". The Authorising Officer replied to this request by letter of 17 November 2005, providing additional information concerning the reasons for the tender's rejection and the name of the successful tenderer. By letter of 29 November 2005, the complainant disputed the Authorising Officer's reply, noting in particular that " *the arguments put forward were vague; in particular, they were a (personal) assessment and did not constitute evaluation of award criteria* ". This letter also raised questions about the arguments put forward by Parliament in its letter of 9 November 2005.

By letter of 9 December 2005, the Authorising Officer denied the assertion that the result of the tendering procedure was based on a personal assessment, and gave further additional explanations, specifically replying to the questions put by the complainant in its letter of 29 November 2005. The complainant did not reply.

#### *(2) Parliament's crèches*

Until 2005, Parliament had two crèches in Brussels for pre-school children: the Eastman Crèche (with a capacity for 90 children) and the Trèfle Crèche (with a capacity for 35 children). Following successive tender procedures, the Eastman Crèche was managed for 13 years by the complainant.

Given that these two facilities were unable to meet the anticipated increase in demand arising from potential users linked, in part, to new staff issuing from the impending enlargement, Parliament decided in 2001 to launch a project for the creation of a large-capacity crèche which could accommodate all the children currently in the existing facilities, could also absorb the waiting list and cope with the likely increase in applications.

Following a new tender procedure, the management of the Wayenberg Crèche was awarded to the firm R. The new Crèche has been in operation since 2 May 2006. Until 31 December 2006, when the complainant's previous contract expired, the Eastman Crèche operated in parallel. On the expiry of the contract with the complainant on 31 December 2006, it was decided not to initiate a new tender procedure for the Eastman Crèche, on the grounds that the Wayenberg crèche should cover all the current needs.

#### *(3) The award of the contract*



The contract for the management of the Wayenberg Crèche was awarded on 27 October 2005 by the Authorising Officer on the basis of the conclusions of the properly constituted evaluation committee. Following the call for tenders under the open tender procedure pursuant to Articles 90 and 91 of the Financial Regulation (4) and Article 158 of the Implementing Rules (5), 11 companies applied for the tender documents and six of them submitted a tender. All tenders were examined, first of all to ensure that they respected the exclusion and selection criteria, and then in light of the three evaluation criteria set out in the tender (see above under the complaint section).

In order to ensure the impartiality of the qualitative evaluation and to reduce the inevitable element of subjectivity, the committee decided, prior to the evaluation, to examine specific aspects for each evaluation criterion and to allocate each sub-criterion a specific number of points depending on the solution sought or proposed in the tender. Parliament annexed this evaluation table to its opinion. The same procedure was used for the evaluation of each firm's tender. The qualitative evaluation was then incorporated into the pre-set quality/price coefficient.

On the basis of the conclusions of the evaluation committee, the Authorising Officer awarded the contract to the firm R., and informed the other bidders that their tenders had been rejected, stating reasons in accordance with Article 100 of the Financial Regulation.

In fact, during the assessment of the exclusion criteria, the evaluation committee had noted that judicial proceedings were ongoing against the complainant for breach of obligations relating to the payment of social security contributions. Nevertheless, considering that these proceedings had not been completed and that they related to the interpretation of the relevant rules, the committee decided not to regard this state of affairs as a reason for exclusion, and to admit the complainant's tender for qualitative evaluation.

Parliament noted that, on 15 March 2006, the complainant lodged an appeal - currently ongoing - before the Belgian courts against the firm R., calling for the application of the Collective Labour Agreement 32bis ("Collectieve Arbeidsovereenkomst", CAO) on the transfer of undertakings. In its appeal, the complainant claimed that the firm to which the contract had been awarded should bear the costs of the dismissals of all the complainant's staff. This appeal followed a number of threats made publicly by the complainant against Parliament and against the firm R. As proof, Parliament attached to its opinion an annex. Furthermore, the complainant was formally requested on several occasions to comply with the social security obligations in respect of its staff. In spite of this, the complainant did not give notice to its staff, in contravention of the rules and of its contractual obligations towards Parliament. Anyway, Parliament decided not to terminate the contract, in view of the need to guarantee some stability for the children attending the Eastman Crèche, as well as for the staff.

*(4) The allegations and claim The first allegation and the claim:*

Parliament pointed out that, by letter of 27 October 2005, that is, on the day of the decision to award the contract, it notified the complainant that its tender had been rejected. In accordance with Article 100 of the Financial Regulation and Article 149(3) of the Implementing Rules, it gave reasons for the rejection.



In line with Article 149(3) (6) of the Implementing Rules, the letter awarding the contract provided for the suspension of the signature of the contract for 15 days, to permit the other tenderers to identify irregularities and to request that the procedure be declared unsuccessful and closed. No request to this effect was made by the complainant, nor was any other complaint lodged.

Subsequently, by letter of 9 November 2005, the complainant requested "*additional information on the reasons for rejection*". Parliament therefore replied, in accordance with Article 149(3) of the Implementing Rules, setting out in a concise but structured manner the reasons for the rejection, which concerned certain aspects of the complainant's tender.

In a second letter of 29 November 2005, the complainant disputed these reasons. In this regard, it (i) alleged that the arguments were "*vague*" and, (ii) made allegations about the subjectivity of its tender's evaluation. In fact, the complainant contested Parliament's reply of 17 November 2005, point by point, in the form of questions on specific matters. It did not request any documents or information of any other nature.

Accordingly, in its reply of 9 December 2005, Parliament confined itself to replying to the issues raised by the complainant and to the allegations concerning the subjectivity of the procedure.

Following Parliament's reply of 9 December 2005, the complainant did not write to Parliament again, and never made any request for information concerning the relative advantages of the successful tender.

At the same time, however, other tenderers which had submitted admissible tenders made written requests for additional information. All of these received a reply, within the time-limit, setting out, in summary form, the substance of the evaluation reports. They all declared themselves to be satisfied.

It is therefore hard to dispute that Parliament acted in good faith and tried to give logical replies to the criticisms and accusations raised by the complainant. Had the complainant considered that it was not informed of the relative advantages of the successful tender, this was due to a misunderstanding and to the fact that it made no such request. Parliament went on to point out that the other questions raised by the complainant approached the matter from a different angle.

The complainant therefore preferred to receive this information through the Ombudsman. Since Article 100 of the Financial Regulation and the Implementing Rules do not set a time-limit for requesting information on the "*relative advantages of the successful tender*", the complainant had no reason to turn to the Ombudsman to obtain this information. A simple letter to the Authorising Officer, with a specific request to this effect, would have sufficed to obtain the desired information at any time.

Accordingly, having now received the complaint from the Ombudsman, and at the same time as sending its opinion, Parliament would write to the complainant on its own initiative, by registered post, and would inform it of the characteristics and relative advantages of the successful tender



(7) .

Finally, the complainant made allegations concerning the subjectivity of the management of the award procedure and disputed the reasons given for the rejection of its tender. Concerning this point, Parliament stressed that, although the Authorising Officer is required to supply, within the time-limits set out in the Financial Regulation, the information requested concerning the grounds for his decision, he/she is not obliged to discuss exhaustively with unsuccessful tenderers the legitimacy of the evaluation of tenders or the regularity of the procedure.

As regards the legitimacy of the award of the contract, this matter could only be the subject of an appeal to the Court of Justice. Compliance with the selection and award criteria laid down in advance in the tender documents and the procurement rules is recorded in the evaluation reports and other documents linked to the evaluation, which form part of the procurement file and are available to all the supervisory authorities. The Financial Regulation does not allow the tenderer to have direct access to these documents. The contracting authority has to ensure that disclosure of the relative advantages of the successful tender does not harm its business interests.

*The second allegation*

In his letter of 27 October 2005, the Authorising Officer did not specify the possibilities for appeal against the decision.

Under the terms of the Financial Regulation and the Implementing Rules, the Contracting Authority is not required to provide such information. Accordingly, the notification complied with the relevant rules. Nevertheless, Parliament did not comply with the commitments contained in the Code of Good Administrative Behaviour which state that a decision of an Institution which may adversely affect the rights or interests of a private person shall contain an indication of the appeal possibilities available for challenging the decision.

It is however clear from the documents in the present case that the failure to mention appeal possibilities, which was clearly unintentional, did not harm the complainant's interests in any way, since there is every reason to think that even if the decision to reject the complainant's tender had mentioned the appeal possibilities, the complainant would probably not have availed itself of them.

There is nothing in the final documents to suggest that the complainant ever intended to lodge an appeal for the annulment of the tender procedure. On the one hand, the complainant never requested any information on the conditions for such an appeal. On the other hand, the complainant decided to lodge an appeal before the Belgian authorities for breach of the rules on transfer of undertakings. The complainant was therefore aware of the various possibilities of appeal, and preferred not to dispute the legitimacy of the tender procedure but rather to request the application of the rules for worker protection in the case of the transfer of undertakings.

Furthermore, the complainant had been in a contractual relationship with Parliament for 13 years. As a service provider for more than 10 years, the complainant should have known that appeals were possible against decisions concerning the award of public contracts.





### **The complainant's observations**

The complainant made, in summary, the following observations:

The complainant took the view that Parliament's statement that there were ongoing judicial proceedings against the complainant for breach of social security obligations was not true. The only procedure in which the complainant was involved during the tender procedure was a dispute with the VAT administration, which had nothing to do with social contributions. The procedure alluded to by Parliament was closed in 2004 with a judgement in the complainant's favour. The complainant's tender did not refer to a judicial procedure.

By invoking the CAO 32 bis, the complainant claimed, by means of judicial proceedings, that the firm R. should take over the complainant's staff, but not that it should be in charge of that staff's dismissal.

Parliament accused the complainant of publicly making threats against it and against the said firm and referred to an annex (namely, a report of a staff meeting of the complainant). The complainant could not find in the text of that report any indication of threats made. The passages underlined by Parliament only concerned statements made by staff members and only bound those who made them.

The complainant also pointed out that Parliament was not a party in the above dispute and that, given that the administration suddenly appeared to possess documents concerning that dispute, originating from the complainant's lawyer's file, this suggested the existence of collusion with a contractor.

Contrary to what Parliament stated, the complainant had complied with all the legal procedures concerning the closure of the firm and collective dismissal. The members of the personnel were dismissed with effect from 1 August or 1 September 2006.

The complainant pointed out that all the above had nothing to do with the complaint to the Ombudsman, but that Parliament had tried to put the complainant in a bad light.

#### *The first allegation and claim*

The complainant pointed out that Parliament had *not* informed the complainant about the 15 day suspension of the signature of the contract, which meant to allow time for identifying irregularities or for requesting the procedure be declared unsuccessful. The complainant could therefore not exercise its right to avail itself of these possibilities. Moreover, this would have been impossible on the basis of the very summary rejection grounds. The complainant instead requested additional information within 15 days of the rejection of its offer. Parliament hid itself behind excessive formalism. Indeed, the complainant did not explicitly request other documents or information on the relative advantages of the offer retained. The complainant also did not make accusations concerning the subjectivity of the evaluation, but about the subjectivity of the arguments used by Parliament and their lack of reasoning. Parliament had thus intentionally avoided replying to the complainant's demand for clear information.

After the complaint to the Ombudsman, Parliament had now "spontaneously" provided the





requested information, in its letter of 25 January 2007.

*The second allegation*

The complainant did not understand how Parliament could conclude that, even if the decision to reject its tender had mentioned the appeal possibilities, it would probably not have used them. If the complainant had known of the appeal possibilities and had disposed of the information that was finally communicated to it by Parliament in January 2007, it would definitely have introduced a request for the procedure to be considered unsuccessful and have appealed. The complainant also disputed the causal link suggested by Parliament between its appeal before the Belgian authorities and its knowledge of the appeal possibilities concerning the tender procedure, stating that these had nothing to do with each other.

After examining the additional information sent by Parliament on 25 January 2007, the complainant was of the opinion that its interests had been harmed and wished to extend its original complaint. The complainant's arguments in this respect were the following:

*(1) The evaluation committee did not base itself only on the documents of the tender:*

In its reaction to the initial complaint, Parliament stated that, when evaluating the exclusion criteria, the evaluation committee had already noticed that a judicial procedure was ongoing against the complainant concerning its failure to pay social security contributions. In the complainant's offer, there is no mention of this procedure. Parliament had thus infringed the tender procedure rules by taking into consideration elements other than those that appeared in the complainant's tender. The above wrong information may not, perhaps, have led to the rejection of the complainant's offer, but undoubtedly contributed to the negative image of the complainant and its offer. The complainant was moreover not sure that this was the only additional negative information on which the evaluation committee had based itself.

*(2) The evaluation criteria as described in the evaluation table were objective but absolutely not reliable for an evaluation (2.1) The value of the pedagogic project:*

The complainant quoted the definition of "pedagogic project" given by the Dutch Language Union (Nederlandse Taalunie), which showed that it is about vision, values, and choices. In the evaluation chart, there was however nothing or very little about these issues. Out of a total of 40 marks, 6 concerned the presentation and 4 the professional relations with third persons, which meant that a quarter of the marks were awarded to issues that have nothing to do with the pedagogic project. Also other criteria like the "coherence of the project" (5 marks), the "feasibility of the project" (4 marks) and the "suppleness of the project" (5 marks) did not evaluate the choices made. Substantive criteria, although not the most important, were "multi-cultural aspects" (5 points) and the "assortment of proposed activities" (5 marks). But here also, the content was not evaluated. Only the numbers were. Fundamental choices of values and pedagogic methods were not taken into account. Nor were the attitudes and behaviour of the teaching personnel taken into account either. It was therefore possible that a very weak scientifically structured project scored very highly, whereas a valued project which followed the latest developments scored much lower.

*(2.2) The methods for management, organisation and implementation of the project, employment policy, recruitment policy, human resources management, measures for guaranteeing the stability and the personnel's level of qualification:*

Here again, one was confronted with apparently objective criteria which insufficiently reflected the awarding criteria. The complainant wondered whether the term 'project' meant pedagogical



project or the way in which the crèche is managed in all its aspects. The complainant made comments with regard to the criteria "management methods" and "methods to ensure the stability of the personnel". As regards the last criterion, it was apparently enough to enumerate the measures, but whether these measures were still up to date or considered as best practices appeared not to be important. The complainant pointed out that employment and recruitment policy and the qualification level of the personnel were not taken into consideration in the evaluation.

The evaluation of the personnel policy was reduced to the way in which absent staff is replaced and to the permanent training of personnel. Other aspects were not taken into account.

*(3) The evaluation by the evaluation committee was not correct*

As regards the marks awarded to the complainant's tender, the complainant provided two pages of detailed comments on the various sections of the evaluation chart, which, next to the marks given within each section, also contained references to the relevant pages of the complainant's offer.

On the basis of the above elements, the complainant concluded that Parliament had acted illegally when awarding the contract for the Wayenberg Crèche to the firm R. The complainant pointed out that it did not have a claim for material damages, but that it wished to obtain compensation for moral damages.

## **THE DECISION**

### **1 Preliminary remark**

1.1 Until 2005, the European Parliament had two crèches for pre-school children in Brussels. One of the crèches, the Eastman Crèche (8), was managed for 13 years by the complainant, a Belgian company, following successive tender procedures. The second crèche was called the Trèfle Crèche. Given that these two facilities were unable to meet the anticipated demands of an increased number of potential users, Parliament decided in 2001 to launch a project for the creation of a large-capacity crèche. This new crèche - the Wayenberg Crèche (9) - was intended to accommodate all the children currently using the existing facilities, to absorb the children included in the waiting list and to cope with the increase in applications likely to materialise as a result of the forthcoming enlargements of the EU. A tender procedure was organised, in which the complainant participated. However, in the end, the management of the Wayenberg Crèche was awarded to the firm R.

1.2 The complainant subsequently turned to the Ombudsman. This complaint, which was submitted to the Ombudsman on 16 August 2006, concerned an alleged lack of information by Parliament. More particularly, the complainant alleged that Parliament had refused to communicate to it clearly and concretely the relative advantages of the offer selected for the management of its Wayenberg Crèche, and claimed that Parliament should provide it with this information. The complainant further alleged that, contrary to the requirement set out in Article 19 of the European Code of Good Administrative Behaviour (10), Parliament had failed to indicate to it the available possibilities of appeal. In his letter of 8 November 2006 opening an inquiry into the complaint, the Ombudsman asked for Parliament's opinion on the above two



allegations and claim. The Ombudsman's inquiry into these two allegations and the claim, as well as his conclusions are set out below in points 2 (the first allegation as well as the claim) and 3 (the second allegation).

1.3 In its original complaint, the complainant further argued that the information that had been communicated to it concerning the assessment of its own proposal was (1) vague, (2) not unequivocal, (3) based on a purely subjective appraisal, (4) incomplete and (5) incorrect. According to the complainant, these issues *could* indicate that Parliament had illegally awarded the contract to the firm R. The complainant pointed out, however, that it would not be able to judge whether a further complaint concerning unequal treatment and infringement of its rights would be justified, until it had received the information concerning the relative advantages of the successful offer. It went on to point out that this information was the subject of the above-mentioned first allegation.

1.4 It appears that, by letter of 25 January 2007, Parliament finally sent to the complainant the information which the latter had requested and which formed the subject of the first allegation in its complaint to the Ombudsman. In this letter, which explicitly refers to the complaint submitted to the Ombudsman, Parliament informed the complainant of the relative advantages of the successful tender. More particularly, Parliament quoted two pages from the evaluation report relevant to the evaluation of the tenders submitted by the complainant and the successful tenderer. The letter also reproduced the final evaluation chart prepared by the evaluation committee, which showed to the six competing firms the marks awarded for each of the three evaluation criteria, as well as the total marks for each of them. Additionally, Parliament also attached to its letter a more detailed five-page evaluation chart concerning the evaluation of the complainant's tender (with detailed marks for all the three criteria and sub-criteria).

1.5 In its observations on Parliament's opinion, the complainant alleged that, on the basis of the additional information sent by Parliament on 25 January 2007, it was clear that its interests had been harmed and that the contract had been awarded illegally to the firm R. The complainant therefore stated that it wished to extend its original complaint. The complainant put forward three "arguments" in this respect, namely:

- the evaluation committee had not based itself only on the documents of the tender. It had, for instance, referred to an ongoing judicial procedure against the complainant for violation of social security rules, whereas there was no mention of this procedure in the complainant's offer;
- the evaluation criteria as described in the evaluation table were objective but absolutely not reliable for an evaluation; and
- the evaluation undertaken by the evaluation committee was not correct.

1.6 The Ombudsman has carefully assessed the further information that has been made available to him. As regards the five issues presented by the complainant in its initial complaint, namely, that the information communicated to it was (1) vague, (2) not unequivocal, (3) based on a purely subjective appraisal, (4) incomplete and (5) incorrect, the Ombudsman has found nothing which would, at first sight, substantiate those points. There are therefore insufficient grounds for an inquiry into these issues.



1.7 As regards the above-mentioned three new "arguments" presented by the complainant in its observations in support of its allegation that the contract had been awarded illegally to the firm R., the Ombudsman notes that Article 195 of the EC Treaty provides that "*the Ombudsman shall conduct inquiries for which he finds grounds*". The Ombudsman, first, notes that there is nothing in the complainant's arguments which would suggest that the contract had been awarded illegally to the firm R. At no point did the complainant provide evidence which would substantiate this allegation or indicate the reasons, such as, for example irregularities in the decision, why the contract would allegedly have been awarded illegally to the successful firm. The complainant's arguments appear to concern the evaluation of its own tender rather than the alleged illegality of the award of the contract to the other firm.

As regards the complainant's first argument that the evaluation committee had not based itself only on the documents of the tender, the Ombudsman notes that, as the only evidence supporting this argument, the complainant referred to the fact that the evaluation committee had noted, during the assessment of the exclusion criteria, that judicial proceedings were ongoing against the complainant but that this information was not contained in its tender. It appears however from Parliament's opinion that the evaluation committee did not take this issue into account and decided to admit the complainant for the qualitative evaluation. In fact, it appears that the complainant did rather well in the tender procedure as it was ultimately ranked as the second best tenderer. The above-mentioned argument of the complainant thus contains no elements which would indicate that the contract was awarded illegally to the successful firm.

As regards the complainant's second argument that the evaluation criteria were objective but absolutely not reliable for an evaluation, it appears that this criticism - which reflects the complainant's personal view with respect to several aspects of pedagogy - concerns the evaluation criteria (as well as the various sub-criteria) used in the tender procedure and the marks awarded to each of them rather than the evaluation of the various tenders as such. This argument can therefore not support the complainant's allegation that the contract was awarded illegally to the successful firm.

The complainant thirdly argued that the evaluation by the evaluation committee was not correct. This argument is based on an interpretation by the complainant of the points the evaluation committee awarded to its offer for certain sub-criteria. It should be underlined in this regard that the evaluation and the marking of the six tenders were made on a comparative basis and that analysing whether the evaluation was incorrect would require an in-depth analysis of all the tenders and of the marks attributed to each of them. Parliament and, more particularly, the evaluation committee in the present case, have however a broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender. Further, review by the Court must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers (11) . The Ombudsman considers that he should apply similar standards and that his review should therefore be limited, as regards the present context, to examining whether there was a manifest error of assessment. The Ombudsman has examined the evaluation chart concerning the complainant's offer and its comments thereon. These comments reflect the complainant's personal interpretation of the



evaluation carried out by the evaluation committee. However, from the Ombudsman's examination, there would appear to be no elements suggesting that a manifest error occurred in the evaluation of the complainant's tender.

The Ombudsman would finally like to point out that the mere fact that the complainant had been managing Parliament's Eastman Crèche for 13 years was neither (i) a guarantee that it would automatically be awarded the management of the Wayenberg Crèche nor (ii) an indication that the award of the management to another firm would be illegal. On the basis of these considerations, there appear to be no grounds for an inquiry in the complainant's allegation that the contract was awarded illegally to the successful firm.

1.8 Finally, in its observations, the complainant alleged that Parliament accused it of publicly making threats to Parliament and the firm R. The Ombudsman notes that the document to which Parliament referred to as proof was a staff meeting report dated 22 May 2006. Given that this meeting took place seven months after the contract had been awarded to the successful firm, the information contained in the report could not possibly have played a role in the evaluation of the complainant's tender. Given further that, as the complainant itself pointed out, this issue had nothing to do with its complaint and that asking Parliament for a new opinion on these allegations would further delay the decision on the original complaint, the Ombudsman does not consider it appropriate to conduct further inquiries into this matter. Nor does it appear necessary to investigate the other issues raised by the complainant concerning how Parliament obtained that report. However, the complainant obviously has the possibility to lodge a new complaint with regard to this issue, after having made the appropriate prior administrative approaches to Parliament.

## **2 The alleged failure to communicate to the complainant the relative advantages of the tender retained**

2.1 The complainant participated in the tender procedure for the award of the contract for the external management of Parliament's Wayenberg Crèche. On 27 October 2005, Parliament informed the complainant that its tender had not been retained. The complainant then wrote several times to Parliament in order to obtain more information concerning the rejection of its tender. Not satisfied with Parliament's replies, on 16 August 2006, the complainant lodged the present complaint with the Ombudsman. In that complaint, the complainant made two allegations and a claim. The first allegation was that Parliament had refused to communicate clearly and concretely to it the relative advantages of the tender retained. The complainant claimed that Parliament should provide it with this information.

2.2 In its opinion, Parliament gave an overview of the exchange of correspondence it had had with the complainant further to the rejection of the latter's tender. Parliament also explained the various steps in the tender procedure which led to awarding the contract to the firm R. Parliament referred to the complainant's statement that it had not been informed of the relative advantages of the successful tender. In this regard, Parliament explained that this was due to a misunderstanding and to the fact that no such request had been made by the complainant. In the meantime, Parliament had written to the complainant, informing it of the characteristics and the relative advantages of the successful tender.



2.3 In its observations, the complainant stated that Parliament hid behind excessive formalism. The complainant did indeed not explicitly request other documents or information or ask to be informed of the relative advantages of the offer retained. Nor did the complainant make accusations concerning the subjectivity of the evaluation, but rather concerning the subjectivity of the arguments used by Parliament and its lack of reasoning. Parliament had thus intentionally avoided replying to the complainant's demand for clear information. In the meantime, however, Parliament has "spontaneously" provided the requested information.

2.4 The Ombudsman has carefully analysed the two letters which the complainant sent to Parliament on 9 and 29 November 2005. In the letter of 9 November 2005, the complainant merely asked for complementary information concerning the reasons for the rejection of its tender. In its letter of 29 November 2005, the complainant pointed out that the arguments set out in Parliament's reply of 17 November 2005 were vague and showed a personal rather than an objective evaluation of its tender. The complainant also raised some questions concerning the evaluation of its tender. It is true that in none of the letters did the complainant explicitly ask to be informed of the relative advantages of the successful tender.

2.5 Article 100(2) of the Financial Regulation provides that "*[t]he contracting authority shall notify all candidates or tenderers whose applications or tenders are rejected of the grounds on which the decision was taken, and all tenderers whose tenders are admissible and who make a request in writing of the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract is awarded . However, certain details need not be disclosed where disclosure would hinder application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings of could distort fair competition between those undertakings "* (emphasis added).

Article 149(1) and (2) of the Implementing Rules provide that "*[t]he contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the award of the contract, including the grounds for any decision not to award a contract for which there has been competitive tendering or to recommence the procedure "* and that "*[t]he contracting authority shall, within not more than fifteen calendar days from the date on which a written request is received, communicate the information provided for in Article 100(2) of the Financial Regulation "*.

2.6 It appears from Article 100(2) of the Financial Regulation and Article 149 of the Implementing Rules that, in order to receive information on the characteristics and relative advantages of the successful tender, the unsuccessful tenderer should submit a written request. It is however not entirely clear from these provisions whether the written request needs to be marked explicitly as a demand for information on the relative advantages of the successful tender or whether a mere written request for additional information in general is also sufficient. Considering that the aim of these provisions is to inform the unsuccessful tenderers, the Ombudsman finds it reasonable to consider that these provisions should not be interpreted too strictly.

2.7 It nevertheless appears that this issue does not need to be further examined, given that





Parliament has finally sent the requested information to the complainant, namely, in its letter of 25 January 2007. In this letter, which explicitly refers to the complaint submitted to the Ombudsman, Parliament informed the complainant of the relative advantages of the successful tender. More particularly, Parliament quoted two pages from the evaluation report relevant to the evaluation of, on the one hand, the complainant's tender and, on the other hand, the successful tender. The letter also reproduced the final evaluation chart produced by the evaluation committee, which shows the marks awarded for each of the three evaluation criteria to the six competing firms, as well as the total marks for each of them. Additionally, Parliament also attached to its letter a more detailed five-page evaluation chart concerning the evaluation of the complainant's tender (with detailed marks for all the three criteria and the sub-criteria).

2.8 Considering that Parliament has finally provided the requested information to the complainant, no further inquiries into the first allegation and claim are necessary.

### **3 The alleged failure to indicate the possibilities of appeal to the complainant**

3.1 The complainant alleged that, contrary to the requirement set out in Article 19 of the European Code of Good Administrative Behaviour, Parliament failed to indicate to it the possibilities of appeal.

3.2 In its opinion, Parliament stated that, in his letter of 27 October 2005, the Authorising Officer did not specify the possibilities for appeal against the decision. Under the terms of the Financial Regulation and the Implementing Rules, the Contracting Authority is not required to provide such information, and accordingly the notification complied with the relevant rules. Nevertheless, Parliament accepted that it did not comply with the commitments defined in the European Code of Good Administrative Behaviour which states that a decision of an Institution which may adversely affect the rights or interests of a private person shall contain an indication of the appeal possibilities available for challenging the decision.

Parliament stated that it was however clear from the documents in the case that the failure to mention appeal possibilities, which was clearly unintentional, did not harm the complainant's interests in any way, since there was every reason to consider that, had the decision to reject the complainant's tender mentioned the appeal possibilities, the complainant would probably not have availed itself of them.

Also, according to Parliament, there was nothing to suggest that the complainant ever intended to lodge an appeal for the annulment of the tender procedure. On the one hand, the complainant never requested any information on the conditions for such an appeal. On the other hand, the complainant decided to lodge an appeal before the Belgian authorities for breach of the rules on transfer of undertakings. The complainant was therefore aware of the various possibilities of appeal, and preferred not to dispute the legitimacy of the tender procedure but rather to request the application of the rules for worker protection in the case of the transfer of undertakings.

3.3 In its observations, the complainant pointed out that it did not understand how Parliament could conclude that, even if the decision to reject its tender had mentioned the appeal possibilities, it would probably not have used them. If the complainant had known of the appeal





possibilities and had disposed of the information that was finally communicated by Parliament only in January 2007, it would definitely have introduced a request for the procedure to be considered invalid and have appealed. The complainant also disputed the link suggested by Parliament between its appeal before the Belgian authorities and its alleged knowledge of the appeal possibilities concerning the tender procedure, stating that these had nothing to do with each other.

3.4 With regard more particularly to tender procedures, the Ombudsman notes that the Financial Regulation and the Implementation Rules do not foresee an obligation to inform unsuccessful tenderers of appeal possibilities (12) . Nevertheless, general principles of good administration apply also to tender procedures and therefore to the case at hand.

3.5 The Ombudsman notes that principles of good administration require that the institutions which take a decision that may adversely affect the rights or interests of a private person shall indicate the appeal possibilities available for challenging the decision (13) .

3.6 In the present case, it appears that neither in its letter of 27 October 2005 nor in its later correspondence to the complainant did Parliament inform the complainant of the possibilities of appeal against the awarding decision. The Ombudsman notes that by stating that the complainant did not make a request for the procedure to be declared unsuccessful, Parliament appeared to imply in its opinion that the complainant had been informed about the suspension of the signature of the contract for 15 days in order to permit it to highlight irregularities or request the procedure to be declared invalid. As pointed out by the complainant, this was however not the case.

3.7 As regards Parliament's argument that its failure to mention the appeal possibilities did not harm the complainant's interests because the complainant would, in any case, not have availed itself of the appeal possibilities, the Ombudsman considers that this statement amounts to mere speculation by Parliament with respect to the complainant's intentions, and that Parliament has not substantiated its position with concrete evidence.

3.8 The Ombudsman also considers that it was inappropriate for Parliament to state that there was nothing which suggested that the complainant ever intended to lodge an appeal for the annulment of the tender procedure, because the complainant never requested any information on the appeal conditions. As pointed out above in point 3.5, it was for Parliament, in accordance with principles of good administration, to inform the complainant about the appeal possibilities, and not for the complainant to ask for this information. Therefore, the fact that the complainant did not ask about the appeal possibilities cannot be invoked by Parliament as an argument to support its position. Also, considering that the case before the Belgian courts concerned the transfer of undertakings and had thus nothing to do with the tender procedure as such, the Ombudsman considers that the fact that the complainant initiated these proceedings in Belgium does not prove that it was aware of the possibilities of appeal concerning the decision to award the tender.

3.9 On the basis of the above considerations, the Ombudsman concludes that Parliament's



failure to inform the complainant of the possibilities of appeal constitutes an instance of maladministration. He therefore makes a critical remark below.

#### **4 Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

Principles of good administration require that the institutions which take a decision that may adversely affect the rights or interests of a private person shall indicate the appeal possibilities available for challenging the decision (14). In the present case, it appears that neither in its letter of 27 October 2005 nor in its subsequent correspondence to the complainant did Parliament inform the latter of the possibilities of appeal against the awarding decision. Parliament's argument that its failure to provide the relevant information did not harm the complainant's interests has not been established. The Ombudsman therefore concludes that Parliament's failure to inform the complainant of the possibilities of appeal constitutes an instance of maladministration.

Given that this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

The President of Parliament will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

- (1) The complaint was registered on 20 September 2006.
- (2) The "Eastman Crèche" was Parliament's crèche which was based in the Eastman building in the Leopold Park in Brussels.
- (3) The crèche is based in Wayenberg street in Brussels.
- (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, OJ 2002 L 148, p. 1.
- (5) Commission Regulation (EC, Euratom) No 2342/2002/EC 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, OJ 2002, L 357, p. 1.
- (6) Parliament probably intended to refer to Article 149(2), as Article 149(3) does not exist.



(7) The Ombudsman notes that Parliament did so on 25 January 2007. Parliament's letter, however, bears two dates: a typed one (24 January 2007) and a stamped one (25 January 2007). The present decision will refer to the letter as the letter " of 25 January 2007 ").

(8) See footnote 2.

(9) See footnote 3.

(10) The European Code of Good Administrative Behaviour is available on the Ombudsman's website ( <http://www.ombudsman.europa.eu> [Link]).

(11) Case T-169 *Esedra v Commission* [2002] ECR II-609, paragraph 95.

(12) The Ombudsman also notes that, in the present case, the Contracting Authority was Parliament, and that Parliament has not adopted a Communication similar to Commission Communication COM(2003)395 which foresees that unsuccessful tenderers are informed rapidly of the rejection of their bids and also provides for two calendar weeks before the contract is signed to enable unsuccessful tenderers to ask for additional information concerning the reasons for the rejection of their bids. This Communication was adopted by the Commission in response to the Ombudsman's own-initiative inquiry OI/2/2002/IJH ( *Communication from the Commission COM(2003)395 final of 3 July 2003 - 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* ).

(13) See Article 19 of the European Code of Good Administrative Behaviour.

(14) See footnote 13.