

Decision of the European Ombudsman closing his inquiry into complaint 3139/2007/RT against the European Agency for the Management of Operational Cooperation at the Borders of the Member States of the European Union (FRONTEX)

Decision

Case 3139/2007/RT - Opened on 21/01/2008 - Decision on 10/12/2008

THE BACKGROUND TO THE COMPLAINT

1. The complainant is a private company in Luxembourg. Together with its partner, based in Poland, it took part in a tender procedure organised by Frontex in the field of informatics services, hardware and software licences. It submitted a bid for Lot No 5 of the above tender, which consisted of the provision of informatics services for adopting IT governance and information security.
2. According to the tender specifications, at the time of submission of the tender, "*the tenderer must hold a valid facility security clearance ['FSC'] for the company as a whole, issued by the National Security Authority*". This had to be proved by providing "*a copy of a valid FSC for the company as a whole or a declaration stating that the company possesses a valid FSC, if the copy cannot be provided due to the legal provisions of the given country.*"
3. The complainant sent its bid for the above tender and informed Frontex that it did not possess an FSC. In this respect, it explained that Luxembourg law "*makes no provisions for the grant of the FSC on demand to a non-state owned entity*". It also stated that, with an eye to taking part in the tender, it had contacted the Luxembourg authorities which informed it that "*following the relevant European Commission regulations, in the event of the award of the contract [to the complainant], Frontex will have to ask the Luxembourg National Security Authority to confirm that [the complainant] holds a valid FSC and that this official demand for confirmation will enable the Luxembourg National Security Authority to initiate the necessary procedure to grant the clearance.*"
4. Frontex rejected the complainant's bid and gave reasons for its decision. The complainant did not agree with Frontex's position and, on 11 December 2007, turned to the Ombudsman.



THE SUBJECT MATTER OF THE INQUIRY

5. In his original complaint to the Ombudsman, the complainant submitted the following allegations and claims.

Allegations:

- Frontex wrongly justified its refusal of the complainant's bid by (i) stating that the complainant failed to have the relevant "*professional capacity*" because it was not able to provide the FSC, and, at the same time, by (ii) referring to the delay likely to materialise in the execution of the contract if Frontex were to award the contract to the complainant and the latter would have to wait for the granting of the FSC by the Luxembourg authorities.
- The tender condition that in order to have their offer accepted, the bidders should have a valid FSC to prove their professional capacity was discriminatory against Luxembourg based companies because according to Luxembourg law they could not obtain the FSC without having first had the contract awarded to them by a public entity (including EU institutions). According to the complainant, only a public entity could initiate in Luxembourg the procedure for granting the FSC to a private entity.

Claims:

- Frontex should reevaluate its offer.
- In absence of this possibility, Frontex should annul the previous call for tender and the contracts awarded and organise a new call which would offer equal conditions of participation for all tenderers, including those from Luxembourg.

THE INQUIRY

6. On 13 May 2008, Frontex sent its opinion, which was drafted in English. On 11 June 2008, Frontex provided a translation of its opinion in French, which was forwarded to the complainant with an invitation to make observations. The complainant presented its observations on 4 August 2008.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Allegation of failure to justify properly the refusal of the complainant's bid

Arguments presented to the Ombudsman

7. The complainant alleged that Frontex wrongly justified its refusal of the complainant's bid. On the one hand, Frontex stated that the complainant failed to have the relevant "*professional capacity*" because it was not able to provide an FSC. On the other hand, Frontex argued that



the execution of the contract could have been delayed if Frontex had awarded the contract to the complainant, and the latter had had to wait for the Luxembourg authorities to grant it the FSC.

8. The complainant doubted whether requiring tenderers to have an FSC when taking part in a procurement procedure is the right instrument to determine their technical capacity and experience. It pointed out that it had worked on a number of projects within the European and international institutions and bodies, such as the European Railway Agency and NATO (it submitted references in this regard). It also stated that the members of its staff involved in the above projects have Personnel Security Clearance, but the company as a whole does not have an FSC. This should not preclude, however, that the company as such has no professional capacity. Moreover, its Polish partner in the consortium had a valid FSC.

9. In its opinion, Frontex stated that the requirement of an FSC should be read in light of the technical capacity requirement that tenderers should have at least 3 years of directly relevant experience. The tenderer chosen would have to carry out the IT management of classified documents and therefore needed to have an FSC previously issued by a competent authority in its respective Member State. The FSC would prove the experience relevant for Frontex, which, taking into consideration the extremely fast development within the IT sector, needed to be recent.

10. Frontex also took the view that references for professional experience cannot be accepted as equal to an FSC, which is granted by the national competent authorities, in accordance with their special procedures. According to the tender specifications, a copy of a valid FSC must be provided for each individual member company of the consortium.

11. Frontex emphasised that, even if the complainant could be provided with an FSC at a later stage, the call for tender mentioned that the estimated starting time for the winning company would be October 2007. Therefore, the procedure for granting the FSC to the complainant would cause delays for Frontex. Furthermore, the possibility that the Luxembourg authorities might refuse the complainant the FSC could not be ruled out.

The Ombudsman's assessment

12. There are two aspects under dispute. First, whether the condition to possess a valid FSC at the time of submitting the bid was really necessary, if the tenderer could otherwise, for instance by submitting references prove, that it had the technical capacity for the services sought by Frontex. Second, whether the reasoning given by Frontex for the rejection of the complainant's bid was reasonable.

13. In accordance with Article 97 of the Financial Regulation [1], it is for the Community institutions, that is, the contracting authorities, to establish the selection criteria for evaluating the capability of the tenderers. However, the criteria must be defined in advance, must be clearly set out in the call for tender and according to Article 135 of the Implementing Rules [2], must be non-discriminatory.



14. In the present case, one of the tender conditions was that applicants had to be in possession of a valid FSC at the time they submitted their bid. This requirement was clearly stated in the specifications of the call for tender and the complainant was properly informed of it.

15. In its opinion on the complaint, Frontex emphasised that its profile is to deal with the protection of EU external borders . Given this fact, Frontex wanted to be sure that the concerned tenderer could work with classified information. It considered that the required professional capacity should be proven on the basis of a valid FSC and not on the basis of other documents, such as references.

16. In the Ombudsman's view, the above justification is reasonable.

17. The Ombudsman considers that, when establishing the FSC requirement Frontex did not go beyond its broad discretion to set up the conditions of capability for the tenderers. Moreover, it provided a reasonable justification for the condition in question. Therefore, the Ombudsman finds no maladministration as regards the first aspect of the present allegation.

18. In its letters to Frontex, the complainant argued that Frontex could have first awarded it the contract and then initiated the procedure to obtain an FSC from the Luxembourg authorities. In its replies, Frontex stated that if the FSC had to be issued after the submission of the complainant's bid (and the signature of the contract), the execution of the contract would have been delayed, The Ombudsman understands Frontex's statement as constituting additional reasoning given in reply to the complainant's above-mentioned argument.

19. The submission of such additional reasons by Frontex does not prove that its reasoning was unreasonable, but rather that it wished to take a position on all of the complainants' arguments.

20. In light of the above, the Ombudsman does not find an instance of maladministration in relation to this aspect of the present allegation either.

B. Allegation of discrimination

Arguments presented to the Ombudsman

21. The complainant alleged that the tender condition that the bidders should have a valid FSC to prove their professional capacity was discriminatory against Luxembourg-based companies. According to Luxembourg law, they could not obtain an FSC without having first had the contract awarded to them by the public entity. According to the complainant, only public entities in Luxembourg could initiate the procedure for granting the FSC to a private entity. This fact makes the acquisition of an FSC in Luxembourg difficult.

22. The complainant also referred to Commission Decision 2006/548/EC [3] and Council Decision 2005/952/EC [4] , concerning internal security rules regarding the handling of EU



documents containing sensitive information. These decisions provide for a valid FSC to be held by tenderers bidding for procurement contracts which involve the handling of sensitive documents. The complainant took the view that, according to these rules, the Commission may initiate procedures with national authorities in order to obtain FSCs. Frontex did not do this in its case. The complainant went on to say that, because of the FSC requirement, Frontex required *de facto* that Luxembourg-based tenderers should have been previously awarded contract by a public entity, thereby meeting the condition for obtaining an FSC in Luxembourg; and, therefore, it discriminated against those Luxembourg tenderers who did not possess such a contract.

23. In its opinion, Frontex first explained that it did not apply the internal rules of the Commission and the Council, but its own internal rules, adopted by the Frontex Executive Director on 1 March 2006. These rules do not contain an obligation for it to initiate procedures with national authorities regarding the issuance of FSCs. In any case, even if the above-mentioned Commission and Council decisions were applicable, Frontex did not share the complainant's interpretation of the relevant provisions. In its view, the Commission and the Council can only request confirmation from the national authorities as to whether the FSC has already been granted. They were not in a position to actually initiate the procedures. It explained that, even before initiating a negotiated procedure for a classified contract, the institutions are obliged to verify whether the companies hold a valid FSC. Further, it explained that the requirement to possess a valid FSC applied to all tenderers equally.

The Ombudsman's assessment

24. As mentioned in paragraph 13 above, the contracting authorities have a wide margin of discretion to lay down conditions for evaluating the capability of tenderers. However, the conditions must be defined in advance, must be clearly set out in the call for tender and must be non-discriminatory.

25. On the basis of the evidence submitted by the complainant in the present case, it is not excluded that the national procedure to obtain an FSC in Luxembourg may be complex. However, the fact that only those firms which have a contract with public authorities can apply to obtain an FSC, does not necessarily mean that the procedure for obtaining an FSC in Luxembourg is more complex or more difficult than in other Member States.

26. The Ombudsman recalls, however, that his mandate under Article 195 EC does not enable him to review the activity of national administrations. This task falls within the mandates of the respective national Ombudsmen.

27. Therefore, he will limit his analysis to determining whether Frontex's requirement for tenderers to hold a valid FSC was discriminatory with respect Luxembourg companies which, in order to get an FSC, had to go through more complex national procedures than companies in other Member States. It is the Ombudsman's understanding that, by introducing the FSC requirement, the complainant felt that Frontex had undermined the equality of opportunity of all tenderers and therefore failed to adhere to the principle of equal treatment between them.



28. In line with the established case-law of the Community courts, the principle of equal treatment provides that comparable situations must not be treated differently and different situations must not be treated in the same way [5] . In the field of public procurement, the principle of equal treatment between tenderers is particularly important. It is apparent from the established case-law that the contracting authority is required to comply with the principle that tenderers should be treated equally [6] . It is also clear from the case-law that all tenderers must have an equal opportunity when formulating their tenders [7] .

29. However, the Ombudsman recalls that the fact that some potential tenderers might have more difficulty than others in complying with some of the requested conditions for admission to a tender does not necessarily mean that the equality principle is thereby breached. The issuance of calls for tender aims exactly at selecting the best offer among those tenderers which meet the necessary conditions for admission. The fact that some tenderers do not possess the qualifications required does not necessarily mean that they are discriminated against. The Ombudsman has already concluded in paragraph 17 above that the requirement in question was reasonable and did not constitute a disproportionate requirement.

30. Concerning the allegation of general discrimination against Luxembourg-based firms, the Ombudsman underlines that the complainant has not questioned the fact that other Luxembourg firms may have had a contract with public authorities and thereby obtained an FSC. Such firms would have complied with the contested condition for admission in the present tender. The fact that the complainant had not had such a contract, and therefore could not have applied for such an FSC, puts it in a different position from one of those other Luxembourg firms. It has therefore not established a general discrimination by Frontex against Luxembourg-based firms.

31. Moreover, even if the tenderers, whose national rules prescribe less complicated procedures for obtaining an FSC, have a comparative advantage in relation to those whose national rules prescribe a more complex procedure, this advantage results from national legislation and procedures. This is, therefore, not the consequence of any conduct on the part of Frontex, but rather constitutes an inherent *de facto* advantage like many others that can exist in relation to tenderers coming from different Member States.

32. The Ombudsman does not consider that the principle for all tenderers to have an equal opportunity when formulating their tenders should create an obligation on Frontex to remove potential comparative advantages by foregoing the FSC requirement.

33. In addition, as Frontex rightly argued when answering the present allegation, the FSC requirement was clearly announced in the call for tender and was equally applicable to all tenderers.

34. In light of the above, the Ombudsman concludes that the complainant did not submit evidence to prove that the requirement of the FSC was discriminatory against Luxembourg-based companies. Accordingly, the Ombudsman does not find any instance of maladministration in relation to this aspect of the complaint.



C. The complainant's claims

35. The complainant claimed that Frontex should reevaluate its offer. If this were not possible, he claimed that Frontex should annul the previous call for tender and the contracts awarded, and organise a new call for tender offering equal conditions for all the tenderers, including those from Luxembourg.

36. In light of the conclusions mentioned in paragraphs 18 and 34 above, the Ombudsman concludes that the complainant's claims cannot be sustained.

D. Conclusions

On the basis of his inquiries into this complaint, the Ombudsman does not find an instance of maladministration.

The complainant and Frontex will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 10 December 2008

[1] 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 248, p. 1.

[2] 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, OJ 2002 L 357, p. 1.

[3] Commission Decision of 2 August 2006 amending Decision 2001/844/EC, ECSC, Euratom, OJ 2006 L 215, p. 38.

[4] Council Decision of 20 December 2005 amending Decision 2001/264/EC adopting the Council's security regulations **2005/953/EC, OJ 2005 L 346, p. 18** .

[5] Case C-106/83 *Sermide* , [1984] ECR 4209, paragraph 28.

[6] Cases C-285/99 *Impresa Lombardini* , C-286/99 *Mantovani* [2001] ECR I-9233, paragraph 37 and C-315/01 *GAT* , [2003] ECR I-6351, paragraph 73.

[7] Case C-87/94 *Commission v Belgium* , [1996] ECR I-2043, paragraph 45.