

Decision of the European Ombudsman closing his inquiry into complaint 1270/2007/(ET)(ID)(DK)CK against the European Commission

Decision

Case 1270/2007/(ET)(ID)(DK)CK - Opened on 24/07/2007 - Recommendation on 09/06/2008 - Decision on 23/06/2009

The complainant is a company that formed part of a consortium which submitted an offer for a tender advertised by the European Commission. The complainant initially received an award letter. However, the tender in question was cancelled shortly after, due to irregularities in the procedure. The complainant contacted the Commission twice seeking information about the nature of the alleged irregularities. The EuropeAid Co-operation Office replied that the said irregularities concerned a possible infringement of confidentiality and impartiality, as well as a possible external influence during the evaluation procedure.

On 3 May 2007, the complainant turned to the Ombudsman, alleging that the Commission failed to provide adequate grounds for its decision to cancel the said tender procedure. It also claimed that the Commission should reinstate its initial decision or compensate it.

The Ombudsman opened an inquiry. After reaching a preliminary conclusion that the reasons provided by EuropeAid did not appear to be adequate, the Ombudsman issued a draft recommendation inviting it to provide more specific and adequate grounds for the cancellation of the tender. Furthermore, he invited EuropeAid to state clearly that the irregularities found in the tender procedure did not involve the complainant, if such a statement were factually correct.

On 16 July 2008, the Ombudsman's services carried out an inspection of the relevant confidential documents that served as the basis for the cancellation of the tender.

EuropeAid explained that the claimed breach of the tender rules concerned the dissemination of confidential information to a third person by a member of the evaluation committee. It pointed out that these allegations were corroborated by evidence, namely, reports drafted by participants in the evaluation procedure. EuropeAid further stated that it had no evidence to demonstrate the involvement of the complainant in the above irregularities.

The Ombudsman considered Europe Aid's response to be adequate and supported by the results of the inspection of documents carried out by his services. He welcomed EuropeAid's declaration and concluded that it had taken appropriate steps to implement his draft



recommendation. Accordingly, he closed the case.

THE BACKGROUND TO THE COMPLAINT

1. The complainant was part of a consortium which submitted an offer for a tender advertised by the Delegation of the European Commission in Armenia and Georgia ('the Delegation').
2. In late 2006, the Delegation sent the complainant an award letter and the contract for signature. After submitting the requested documents, the complainant received an acknowledgement of receipt from the Delegation.
3. On 20 December 2006, the complainant read a cancellation announcement of the tender in question, stating that there had been irregularities in the procedure which hampered fair competition.
4. On the same day, the complainant wrote to the Delegation expressing its dissatisfaction with the tender's cancellation. In reply, the Delegation pointed out that a contracting authority can cancel a procurement procedure, without providing the tenderers with any compensation, if it detects irregularities in the procedure which hampered fair competition. It noted that, in the case at hand, the irregularities only became apparent during the preparation of the contract and after the award letter had been sent.
5. In its reply, the complainant asked the Delegation to clarify the nature of the alleged irregularities and whether any members of the consortium were involved. This was because the cancellation announcement could be interpreted to imply unfair professional behaviour by one or more of the Consortium's members. The Delegation replied that no further information could be provided to the complainant due to the confidential character of the evaluation proceedings.
6. The complainant turned to the Commission's EuropeAid Co-operation Office (EuropeAid) and asked it to examine the case.
7. On 16 March 2007, EuropeAid replied to the complainant that the:

" said irregularities concerned a possible infringement of the obligations of confidentiality and impartiality and a possible external influence in the framework of the evaluation procedure which could have undermined the independence of the evaluation; the said irregularities had been detected after the conclusion of the evaluation procedure. "
8. On 3 May 2007, the complainant turned to the Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY



9. On 24 July 2007, the Ombudsman opened an inquiry into the complainant's following allegation and claim.

Allegation :

The Commission failed to provide adequate grounds for its decision to cancel the above-mentioned tender procedure.

Claim :

The Commission should terminate the new tender procedure it initiated following the cancellation of the one here concerned and reinstate its decision to award the contract to the complainant. Alternatively, the complainant claims fair compensation.

THE INQUIRY

10. On 24 July 2007, the Ombudsman invited the Commission to comment on the complainant's allegations and claims. On 20 December 2007, the Commission sent its opinion, which was forwarded to the complainant for observations. The complainant submitted its observations on 27 February 2008. On 9 June 2008 the Ombudsman made a draft recommendation to the Commission.

11. Following the draft recommendation, on 16 July 2008, the Ombudsman's services conducted an inspection of certain confidential documents held by the Commission. A copy of the inspection report was forwarded to the complainant.

12. On 25 September 2008, the Commission sent its detailed opinion relating to the draft recommendation. On 19 November 2008, the complainant submitted its observations.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. The Commission's alleged failure to provide adequate grounds for its decision to cancel the tender procedure

Arguments presented to the Ombudsman

13. The complainant alleged that the Commission's decision to cancel the tender procedure in question was not sufficiently and adequately reasoned.

14. The Commission considered that it had provided the complainant with a sufficient account of the reasons for cancelling the tender procedure. According to the Commission, it could not have given any further relevant details concerning the exact nature of the potential confidentiality



breach and potential external influence on the procedure without compromising the identity of those involved in the irregularities or those who could have played a role in establishing the facts.

15. In its observations, the complainant insisted on its complaint. It claimed that it should receive clear reasons for the cancellation of the tender procedure.

The Ombudsman's assessment leading to a draft recommendation

16. The Ombudsman first noted that the principle of equal treatment of tenderers, which is a general principal of community law [1] , necessarily implies the existence of a sufficient amount of transparency. This obligation is designed to enable the verification of whether the requirement of equal and fair treatment of tenderers has been complied with [2] . The obligation is triggered by, among other things, decisions cancelling an award procedure [3] . Accordingly, Article 101 of the Financial Regulation [4] provides that a contracting authority's decision to cancel an award procedure before a contract is signed " *must be substantiated* ", that is, adequately reasoned [5] , and must " *be brought to the attention of the candidates or tenderers* ." This duty to provide reasons, which is also enshrined in Article 253 of the EC Treaty, is precisely intended to ensure an appropriate level of transparency in the contract-awarding procedure. Such transparency, in turn, ensures compliance with the requirement of the equal and fair treatment of tenderers [6] . Relatedly, it is settled law that:

(a) the statement of reasons required by Article 253 of the EC Treaty must be appropriate to the nature of the measure in question. Furthermore, it must show clearly and unequivocally the reasoning of the institution which adopted the measure so as to inform the persons concerned of the justification for the measure adopted, thereby enabling review of those measures; and

(b) the requirements to be satisfied by the statement of reasons depend on the circumstances of each case. In particular, the following circumstances are pertinent: the content of the measure in question; the nature of the reasons given; and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations [7] .

17. The above conditions imply that, in cases like the present one, the question whether the statement of reasons for the cancellation meets the requirements of Article 101 of the Financial Regulation must be assessed as follows. The assessment must take into account: (a) the nature of the reasons given; and (b) the need to ensure that a review of compliance with the requirement for fair treatment of tenderers, especially of the one who was awarded the contract, is possible.

18. In the present case, the tender cancellation announcement on EuropeAid's website simply stated that " [t]he call for tenders is cancelled on grounds of irregularities in the procedure having prevented fair competition ". Following the complainant's request for clarification, EuropeAid's letter of 16 March 2007 added the following: " [T]he said irregularities concerned a possible infringement of the obligations of confidentiality and impartiality and a possible



external influence in the framework of the evaluation procedure which could have undermined the independence of the evaluation; the said irregularities have been detected after the conclusion of the evaluation procedure". The above statements only gave vague and rather unclear information about the irregularities invoked by EuropeAid to justify the cancellation at issue. Such information did not enable a verification of whether the cancellation was reasonably justified [8] and, hence, whether the complainant was treated fairly.

19. In its opinion on the complaint, EuropeAid also made the following remarks. It could not have given any further relevant details concerning the exact nature of the potential confidentiality breach and the potential external influence on the procedure without compromising the identity of those involved in the irregularities or those who could have played a role in the establishment of the facts. The provision of this information would thus have undermined the decision-making process of the institution concerning the award of contracts and the strict rules of impartiality and confidentiality that must apply to this procedure. These rules have been notably established in the Practical Guide to contract procedures for EC external actions ('the Practical Guide') [9]. In particular, Section 2.8 of the Practical Guide states that the identity of the evaluators shall be kept confidential. Moreover, it states that the proceedings of an evaluation committee are confidential, subject to the Contracting Authority's policy with respect to access to documents. The applicability of this Guide is also mentioned in the "*Instructions to tenderers*" that accompany the letter of invitation to tender in a service tendering procedure.

20. In relation to EuropeAid's above arguments, the Ombudsman reiterated that the requirements to be satisfied by the statement of reasons for the cancellation at issue depended on the circumstances of the case and the nature of the reasons given. He did not exclude the possibility that in certain, rather exceptional, circumstances, EuropeAid might rely on duly substantiated grounds of confidentiality/secretcy to support its omission and refusal to give more specific reasons than the ones it provided in the case at hand. However, taking into account the nature of the reasons given by EuropeAid for the cancellation at issue, its above-mentioned argumentation did not demonstrate the existence of such grounds of confidentiality/secretcy.

21. EuropeAid invoked two provisions that are contained in Section 2.8 of the Practical Guide [10]. The first one states that "*the identity of the evaluators will be kept confidential*." The second one states that "*the proceedings of the Evaluation Committee, from the opening of tenders/proposals to the conclusion of the work of the Evaluation Committee, are conducted in camera and are confidential*." The Ombudsman noted that EuropeAid did not explain why the latter provision would be relevant to the case at hand. Indeed, the contested cancellation took place after the Evaluation Committee had reached its conclusion. Moreover, this provision should surely not be interpreted in a way that would favour the non-disclosure of elements involving irregularities in the Evaluation Committee's work, such as breaches of the applicable rules on impartiality. As regards the first provision, it must be interpreted in a way which is compatible with the principle of transparency referred to above and with the principle of proportionality [11]. This compatibility implies, in particular, that the provision must be interpreted and applied in a manner which is reasonably tailored to serve its legitimate objective. The provision appears to further the Community's legitimate interest in adequately protecting



the members of the Evaluation Committee from external interferences and pressures when they perform the sensitive task of evaluating tenders, thereby preserving the integrity of the proceedings. However, in the case at hand, it was possible to infer from the explanations given in EuropeAid's letter of 16 March 2007, in conjunction with the latter's arguments presented in paragraph 20 above, that the evaluation procedure in question was tainted by (a) an external influence and/or (b) the participation of (at least one) evaluator who appeared to have violated the obligations of confidentiality and impartiality [12] . Given these circumstances, even assuming that the provision here discussed was still applicable after the Evaluation Committee had completed its work, it was difficult to understand how keeping secret the identity of the evaluator(s) concerned could still further the objective of preserving the integrity of the procedure. In this regard, the Ombudsman noted that the integrity of the procedure was not preserved. A new tender procedure therefore had to be organised, presumably without the participation of the evaluator(s) concerned.

22. EuropeAid also noted that its relevant decision-making process would have been undermined if it had given further information on the exact nature of the potential confidentiality breach and the potential external influence on the procedure. In this regard, EuropeAid argued that such information could not have been provided without compromising the identity of those involved in the irregularities or those who could have played a role in establishing the facts. With regard to EuropeAid's above remarks, the Ombudsman recalled the principles of transparency and proportionality referred to above; the very limited information given by EuropeAid; and the absence of any further explanations. On the basis of those considerations, the Ombudsman found that it was hard to understand or to imagine how the provision of more specific information concerning the irregularities found by EuropeAid was likely to have had the result indicated by it. For example, if an evaluator were to have a relationship with a tenderer of a kind that could reasonably call into question his/her impartiality (and subsequently the integrity of the evaluation procedure), one could wonder why the provision of such information would undermine EuropeAid's decision-making process.

23. On the basis of the above, the Ombudsman concluded that the reasons provided by EuropeAid for its decision to cancel the tender procedure in question did not appear to be adequate. Hence, EuropeAid's decision was likely to amount to an instance of maladministration. On 9 June 2008, the Ombudsman therefore issued a draft recommendation in relation to the present allegation, in which he recommended that the Commission should consider providing more specific and adequate grounds for the cancellation of the tender procedure in question.

The inspection of the Commission's file

24. In his draft recommendation, the Ombudsman informed the Commission that he wished to see the relevant confidential documents which served as the basis for the cancellation of the tender. On 16 July 2008, his services carried out an inspection of these documents.

The arguments presented to the Ombudsman after his draft recommendation



25. In its detailed opinion, EuropeAid explained that the breaches of both confidentiality and impartiality resulted from alleged contacts made during the evaluation process between one of the members of the Evaluation Committee and a third person. As a consequence of these contacts, confidential information was disseminated relating to the evaluation of offers. After these allegations, which were based both on the person's behaviour and on reports made by several participants in the evaluation process, were assessed and deemed to be credible, it was decided that fair competition had been impeded and that, therefore, the tender procedure in question should be cancelled.

26. EuropeAid also explained the different reasons why, in the present case, keeping secret the identity of the evaluator(s) concerned pursued the objective of preserving the integrity of the procedure. First, as a public body, the Commission is generally required to remain extremely cautious when explicitly mentioning names and identifying individuals presumably involved in unprofessional behaviour. Second, this measure aimed to limit the risks of future pressure or retaliation, since the Commission delegations in small third countries have a reduced number of staff and have to deal with a limited and recurrent number of companies. Finally, the Commission had to maintain the best possible diplomatic and partnership relations with the beneficiary State, which was also involved in the evaluation of offers.

27. In its observations on EuropeAid's reply, the complainant pointed out that the procedure had been cancelled on the mere assumption that the requirements of impartiality and confidentiality had been breached without this actually having been proven. It stated that the Commission cancelled the procedure on the sole basis of the opinion expressed by some participants in the evaluation process. Furthermore, the complainant expressed its dissatisfaction over the fact that the Ombudsman's inspection report did not contain any information relating to the content of the inspected documents.

The Ombudsman's assessment after his draft recommendation

Preliminary remark

28. As noted above, the complainant expressed its dissatisfaction with the fact that the Ombudsman's inspection report did not contain information on the content of the documents inspected. In response to this, the Ombudsman would like to point out that the documents here concerned were confidential, and hence dealt with in accordance with Article 13 of the European Ombudsman's Implementing Provisions [13] . It was therefore not possible to provide the complainant with more information than what was set out in the inspection report.

EuropeAid's response to the Ombudsman's draft recommendation

29. The Ombudsman welcomes EuropeAid's response, which he considers to constitute an adequate implementation of his draft recommendation. Specifically, EuropeAid stated that the claimed breach of the tender rules concerned confidential information disseminated to a third person by a member of the Evaluation Committee. It also explained that this information was corroborated by evidence, namely, reports drafted by other participants in the evaluation



procedure. At the above-mentioned inspection of 16 July 2008, the Ombudsman's services examined documents which supported EuropeAid's position.

B. Claim for compensation

Arguments presented to the Ombudsman

30. EuropeAid stressed that it acted pursuant to the applicable rules and that there were no grounds to justify the complainant's request for damages.

31. The complainant underlined that it should receive compensation for the damage to its reputation suffered as a result of the cancellation in question.

The Ombudsman's assessment leading to a draft recommendation

32. The Ombudsman noted that the complainant's claim could not be granted since it failed to substantiate the alleged damage and establish a sufficient causal link between this damage and EuropeAid's omission to give further information regarding the reasons for the cancellation decision. Nevertheless, the Ombudsman invited EuropeAid to state clearly, in the context of its detailed opinion on his draft recommendation, that the irregularities found in the tender procedure did not involve the complainant, if such a statement were to be factually correct.

The comments presented to the Ombudsman after his draft recommendation

33. In its opinion, EuropeAid stated that: " *it has no evidence to demonstrate the involvement/implication of [the complainant], or any other members of the consortium associated to its offer, in the irregularities found in the tender procedure.* "

34. The complainant argued that the above statement was not sufficient and claimed that the Commission should make a public declaration.

The Ombudsman's assessment after his draft recommendation

35. The Ombudsman welcomes the fact that EuropeAid accepted his above-mentioned draft recommendation. With regard to the complainant's claim for a public declaration, the Ombudsman points out that the present decision will be published on his website. Furthermore, the complainant itself is entirely free to disseminate and give greater publicity to the Commission's above statement.

C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:



EuropeAid has taken appropriate steps to implement the draft recommendation.

The complainant and the Commission will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 23 June 2009

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

[2] Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 61-62.

[3] Case C-92/00 *HI* [2002] ECR I-10745, paragraph 45.

[4] See footnote 4.

[5] Article 149(1) of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation, OJ 2002 L 357, p. 1. According to this provision, "*[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.*"

[6] Case C-92/00 *HI* [2002] ECR I-10745, paragraph 46.

[7] See, e.g., Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 69.

[8] In this regard, see the order of the Court of First Instance, of 19 October 2007, in Case T-69/05 *Evropaiki Dynamiki v European Food Safety Authority* (not yet reported in the ECR), paragraph 51. In that paragraph, the Court remarked that the provisions of Article 101 of the Financial Regulation and of Article 149(1) of Regulation 2342/2002 "*do not state that the decision to abandon the procurement or cancel the award procedure is limited to exceptional cases or must necessarily be based on serious grounds.*"

[9] See the EuropeAid website

(http://ec.europa.eu/europeaid/work/procedures/implementation/practical_guide/index_en.htm [Link]).

[10] The applicability of the Practical Guide in the present case is not in dispute.

[11] The principle of proportionality is not only a fundamental requirement of good



administration (Article 6 of the European Code of Good Administrative Behaviour), but is also recognised as a general principle of Community law. See for instance Case C-384/05 *Piek* [2007] ECR I-289, paragraph 34 (and the case-law cited therein).

[12] Relatedly, Section 2.8.2 of the Practical Guide provides that all members of the Evaluation Committee must sign a Declaration of impartiality and confidentiality and " *[a]ny Evaluation Committee member or observer who has a potential conflict of interest with any tenderer or applicant must declare it and immediately withdraw from the Evaluation* ".

[13] " 13.2 *The complainant shall not have access to:*

(a) documents or information obtained by virtue of Article 5.1 or 5.2 above which have been identified to the Ombudsman as confidential;

(b) evidence given in confidence in accordance with Article 5.3 above.

13.3 Where the Ombudsman inspects the file of the institution concerned or takes evidence from a witness in accordance with Article 5.2 and 5.3 above, the complainant shall not have access to any confidential documents or confidential information obtained as a result of the inspection or hearing. "