

Decision of the European Ombudsman closing his inquiry into complaint 1561/2008/RT against the European Commission

Decision

Case 1561/2008/RT - Opened on 27/06/2008 - Decision on 04/12/2009

THE BACKGROUND TO THE COMPLAINT

1. The complainant is a private company in Romania, which was invited to submit a tender for a service contract relating to a project carried out in Moldova. The tender procedure was organised by the European Commission Delegation in Chisinau, Moldova ('the Delegation').
2. In accordance with the invitation to tender, the deadline for receipt of the tenders at the Delegation was 8 November 2007 at 16.30 (local time).
3. On 6 November 2007, the complainant sent out its tender to the Delegation via a courier service, an international delivery company.
4. On 8 November 2007, at 13.10, the courier service arrived at the Delegation in order to deliver the complainant's tender. However, the Delegation was closed and the delivery failed.
5. The tender opening session started on 9 November 2007 at 10.00. At 12.35 that day, the Delegation received the letter with the complainant's tender, delivered by the same courier service. The letter was not opened and it was not taken into consideration for the evaluation because it was received after the deadline for receipt of tenders.
6. Given that it had sent its tender within the deadline, the complainant requested the Delegation to review its position. It also pointed out that the courier service had attempted to deliver the tender within the deadline but could not do so because the Delegation was closed for lunch. The Delegation rejected the complainant's request. On 29 May 2008, the complainant turned to the Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY



7. In its original complaint to the Ombudsman, the complainant submitted the following allegation and claim.

Allegation :

The European Commission's Delegation to Moldova wrongly excluded its tender from the project carried out in Moldova.

Claim :

The European Commission's Delegation to Moldova should accept its tender for the project in question.

THE INQUIRY

8. On 27 June 2008, the Ombudsman opened an inquiry. On 20 October 2008, the Commission sent its opinion, which was drafted in English. On 3 November 2008, the Commission provided a translation of its opinion in Romanian, which was forwarded to the complainant with an invitation to make observations. No observations were received from it.

9. On 10 February 2009, the Ombudsman's services contacted the complainant by telephone in order to discuss a proposal for a friendly solution. Following that discussion, the complainant sent additional documents by e-mail, which were attached to the Ombudsman's friendly solution proposal sent to the Commission.

10. On 7 July 2009, the Commission replied to the Ombudsman's friendly solution proposal. The Commission's reply was forwarded to the complainant for its observations, which it sent on 21 August 2009.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Allegation of wrongful exclusion of the complainant's tender and related claim

Arguments presented to the Ombudsman

11. The complainant alleged that the Delegation wrongly excluded its tender relating to the project carried out in Moldova.

12. In support of its allegation, the complainant argued that the invitation to tender did not mention that tenders could be received at the Delegation during specific hours. It specified only that the tenders had to be received before the deadline. In the complainant's view, the invitation



to tender should have specified that the Delegation was closed during the lunch break.

13. The complainant also argued that the Delegation should not have refused to accept the certificate of delivery, issued by a private delivery company, which stated that delivery had been attempted before the deadline had actually expired but had proven impossible.

14. In its opinion, the Commission emphasised that it was the tenderers' responsibility to take all necessary measures to ensure that their tenders were received by the Delegation on time.

15. The Commission also stated that the opening hours of the Delegation in Chisinau (Moldavia) are public; they are posted on the entrance, as well as on the Delegation's webpage. This timing complies with local labour legislation. Moreover, the courier service which delivered the complainant's tender delivers and collects parcels on a daily basis to/from the Delegation and, therefore, was well aware of the Delegation's opening hours.

16. In addition, the certificate of delivery issued by the private delivery company merely represented a unilateral declaration by a private courier service and did not contain any written evidence from the Delegation to confirm the attempted delivery. Moreover, the private delivery company in question did not leave a note at the Delegation's premises stating that the delivery failed because the office was closed at that time. Furthermore, the delivery company's representative could have returned at a later stage on the same day to deliver the complainant's letter.

17. The Commission concluded that the complainant's tender was received after the deadline set in the invitation to tender. Therefore, it failed to comply with the formal requirements contained in the tender rules and consequently had to be rejected.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

18. The invitation to tender in the present case stipulated that the tenders could be submitted within a specific deadline (by 8 November 2007 at 16.30) " *either by recorded delivery (official postal service) or hand delivered (including by courier services) directly to the contracting authority in return for a signed and dated receipt.* "

19. Article 143 of the Implementing Provisions of the Financial Regulation [1] ('the Implementing Provisions') provides that the contracting authority may choose the arrangements to be used for the submission of tenders (by letter or by electronic means). However, its discretion in this respect is limited: the arrangements must be non-discriminatory in nature and must not have the effect of restricting the access of economic operators to the award procedure.

20. Paragraph 2 of the said Article provides that, when tenders are submitted by letter, tenderers may choose to do so:

(a) either by post or by courier service in which case the call for tenders shall specify that the evidence shall be constituted by the date of dispatch, the postmark or the date of the deposit slip



; or

(b) by hand delivery to the premises of the institution by the tenderer in person or by an agent for which purposes the call for tender shall specify in addition to the information referred to in article 130(2)a, the department to which tenders are to be delivered against a signed and dated receipt. (emphasis added)

21. In the Ombudsman's view, the invitation to tender in the present case did not comply with the above rules.

22. First, when submitting a tender using either the official postal service or a courier service, tenderers should be subject to the same conditions. In the present complaint, this was not the case. As regards the use of the official postal service, it appeared to be sufficient to send the tender by registered mail within the deadline. As regards using a courier service, it appeared necessary for tenderers to ensure that their tenders in fact "arrived" at the Delegation within the deadline by obtaining a signed and dated receipt. This was obviously not possible because only the time of dispatch was reasonably under the tenderers' control, regardless of whether they were aware of the Delegation's working hours or not.

23. The Ombudsman disagreed, therefore, with what appeared to be the Commission's view, namely, that the complainant should have necessarily verified the Delegation's opening hours when submitting its tender by letter sent via a courier service - an authorised and internationally known private delivery company.

24. In light of the above, the Ombudsman considered that, in the present case, it was wrong to designate as the formal deadline the time at which the Delegation actually received the tenders.

25. Furthermore, in relation to tenders submitted using the official postal service, the invitation in question did not clearly specify what would constitute appropriate evidence of submission: the date of dispatch, the postmark or the date of the deposit slip, as required by Article 143(2)b of the Implementing Provisions.

26. Finally, in the Ombudsman's view, the invitation to tender also did not provide sufficient information for tenderers who decided to submit their bid in person. Such submissions require there to be an official present in the Delegation who is able to receive mail/visitors and to sign and date a receipt which could serve as a proof of submission.

27. In this respect, Article 130(2)a, to which the above quoted Article 143 (2)b refers, only specifies the necessary minimum information to be included in invitations to tender [2] and on how to lodge them. The Ombudsman pointed out in this respect that principles of good administration require that information provided to citizens by the institutions is as complete as possible.

28. In the present case, nothing prevented the Commission from including the opening hours of the Delegation's service in the invitation to tender in question. To be helpful, such information



should have been as complete as possible, including not only precise references to the opening hours on working days but also indicating the days when this service was closed.

29. In light of the above, the Ombudsman made the following preliminary findings of maladministration in relation to the invitation for tender under dispute:

- By linking the deadline to the receipt and not to the dispatch of tenders sent via courier services, the Commission treated tenders submitted via the official postal service and those using a courier service differently. According to the Implementing Provisions, these methods should constitute an alternative choice for tenderers who decide not to submit their tenders in person. In doing so, the Commission failed to guarantee tenderers the same chances of effectively submitting their tenders.
- By not specifying how tenderers should provide evidence that their bids were submitted using the official postal service, the Commission also failed to comply with the Implementing Provisions.
- By not providing, in the invitation for tender, information on the working hours of the Delegation, during which the submission of tenders in person would be possible, the Commission failed to comply with principles of good administration.

30. The Ombudsman pointed out that, although private and official postal services were ultimately responsible for delivering mail on the basis of their respective contracts with the dispatchers, this did not affect the Commission's obligation to establish arrangements for the submission of tenders that were in accord with the Implementing Provisions and with principles of good administration.

31. The Ombudsman made a proposal for a friendly solution, in accordance with Article 3(5) of the Statute of the European Ombudsman [3] .

32. In this respect, the Ombudsman noted that the complainant originally claimed that the Commission should accept its tender as having been submitted within the deadline. However, this claim has in the meantime become redundant because the procurement contract in question was awarded to another firm.

33. Nevertheless, the complainant bore costs relating to the preparation of the tender and submitted evidence to that effect. The Ombudsman referred, in this regard, to the case-law of the Community courts, which states:

" any tenderer who participates in a tendering procedure must, as a general rule, accept the risk that he will remain liable for the costs associated with submission of his tender in the event of the contract being awarded to one of his competitors. However, such risk is accepted on the presumption inherent in any call for tenders that the Commission will act impartially in order to ensure equal treatment between the tenderers. " [4]

34. In light of the aforementioned case-law, as well as his findings of maladministration contained in paragraph 30 above, the Ombudsman considered that the Commission could pay the complainant compensation for the loss incurred--the loss in question being linked to the



costs of participating in the tender procedure. According to the complainant, this loss amounted to EUR 12 690.

The arguments presented to the Ombudsman after his friendly solution proposal

35. The Commission rejected the Ombudsman's proposal for a friendly solution. In its reply, the institution argued that, according to Article 237 of the Implementing rules, Article 143 and 130 paragraph 2 of the said rules do not apply to external actions financed from the Community budget and, consequently, to the procurement procedure under scrutiny. In the Commission's view, the applicable Article for this type of procedure is Article 251 of the Implementing rules, which establishes that " *the tenderers must reach the contracting authority at the address and by no later the date and the time indicated in the invitation to tender.* " This provision does not make any distinction between the tenders submitted by post and those submitted by hand or by courier. The only deadline taken into account is the deadline for the receipt of the tenders, irrespective of the date of dispatch and the modality of submission.

36. The instructions to tenderers, which were annexed to the tender dossier and used for the procurement procedure under discussion, contained similar provisions. They also provided for a deadline for the receipt of tenders which was at a minimum of 50 days after the dispatch of the invitation to tender. The Commission took the view that such a deadline was sufficiently long to allow tenderers to prepare and submit their tenders. In this respect, it stated that, out of the four companies invited to tender, three tenders arrived on time and only the complainant's tender arrived late.

37. The Commission stressed that the only proof of the delivery company's alleged failed attempt to deliver the parcel before the deadline was the unilateral declaration provided by the delivery company itself. The Commission emphasised that the latter did not leave any kind of note at the Delegation's premises concerning the failed delivery. This was, however, required by the company's *Terms and Conditions of carriage* .

38. The Commission also recalled that, according to the instructions to tenderers, delivery by courier can only be proved by a dated receipt signed by the contracting authority. If the tenderer does not receive a receipt in due time, it should be up to the tenderer to take the necessary measures in order to ensure timely delivery. Therefore, in the present case, the complainant should have acted diligently and maintained contact with the delivery company, insisting that delivery be made before the deadline.

39. Furthermore, the information about the Delegation's opening hours is posted on the entrance, as well as on the Delegation's webpage. The delivery company was well aware of these opening hours, given that it delivers and collects parcels on a daily basis to/from the Delegation. The Commission took the view that the complainant's tender offer was not received in time, due to the lack of care on behalf of both the complainant and the delivery company.

40. The Commission concluded that the invitation to tender complied with the requirements of the Implementing rules and with the principles of good administration and did not create



discrimination among tenderers with respect to the submission of their tenders. Therefore, the complainant must bear the costs associated with the submission of the tender.

41. In its observations, the complainant pointed out that, in all procurement procedures organised by the Commission in which it had previously taken part, the opening hours of the contracting authority were mentioned in the instructions to tenderers and in the invitation to tender. Moreover, in the documents relating to the procurement procedure under discussion, it was not specified that the tenderers should consult the Delegation's webpage or check personally the opening hours posted at the entrance of the institution. The complainant argued that the Commission failed to act diligently as regards the organisation of the procurement and failed to provide tenderers with all the required information. It took the view that the Commission failed to ensure the equal treatment of all tenderers.

The Ombudsman's assessment after his friendly solution proposal

42. At the outset, the Ombudsman finds it useful to clarify his preliminary findings of maladministration on which his proposal for a friendly solution was based. His concerns related primarily to the quality of the information provided in the invitation for tender.

43. The invitation to tender in question only stated that tender offers could be submitted within a specific deadline to the Commission's Delegation in Moldova " *either by recorded delivery (official postal service) or hand delivered (including by courier services) directly to the contracting authority in return for a signed and dated receipt.* " (emphasis added)

44. The Ombudsman first considered that this information was not sufficiently precise and exhaustive for those tenderers who decided to deliver their bids by courier service ('private post') or by hand.

45. Those tenderers had to ensure that their parcels arrived at the Delegation at a time when one of its officials was present so as to issue a signed and dated receipt for them. In such circumstances, it might/would have been helpful for the tenderers if the invitation had included information on the Delegation's working hours.

47. Moreover, it is worth recalling that the bids covered by the Commission's external actions are often submitted in countries, where a permanent presence of staff is required in the diplomatic representations. Consequently, it is possible for the staff of the Delegations to also receive parcels outside working hours. If the Commission wished to limit the reception of bids to its Delegation's working hours, it would have been useful to include this information in the invitation to tender.

48. As regards the different provisions in the invitation to tender concerning the submission of bids by official post and by courier service, the Ombudsman reiterates that Article 143 of the Implementing Provisions suggests that the same treatment should be given to bids delivered via the official post and bids delivered using private couriers ('private post'). Article 143 differentiates the above treatment from the treatment of bids submitted by hand (by the tenderer



in person or by an agent.)

49. However, the invitation to tender in question contained, on the one hand, the provision " *by recorded delivery (official postal service)* " and, on the other hand, the provision concerning " *the signed and dated receipt* ", which was needed in the event delivery had been effected by the private post. The invitation thus gave the impression that delivery by official post did not depend on the presence of the Delegation's staff, while delivery by private post did require such presence. In other words, those tenderers who decided to submit their bids at the end of the deadline and opted for the official post had a greater chance of having their bids successfully submitted than those who also decided to submit their bids at the end of the deadline, but opted to use the private post.

50. In order to avoid the above impression, it would thus have been reasonable to include a clear and precise description in the invitation for tender concerning which document(s), such as, for example, a deposit slip, could constitute evidence of delivery to the Delegation, when using the private and official post.

51. Moreover, the Ombudsman reiterates that those tenderers who choose to submit their bids by private or official post have, in fact, very limited control over the moment their bids are delivered when compared with delivery by hand. When bids are submitted by private or official post, the evidence as to when delivery exactly took place may only be provided to the tenderers at a later stage. If the bids are sent to a destination outside of the EU, the time it takes for tenderers to receive such evidence will inevitably be longer. As a result, the Ombudsman does not understand the Commission's submission, contained in its reply to his proposal for a friendly solution, to the effect that if a tenderer who used a courier service does not receive a signed and dated receipt **in due time** , that tenderer should take the necessary measures in order to ensure the timely delivery. The Ombudsman recalls in this context that, although it might be advisable for tenderers not to wait until the last moment of the foreseen deadline in order to submit their bids, according to the invitation for the tender in question, the bids could be received by the Delegation up until the very last minute of the very last day of the established deadline.

52. In light of the above, the Ombudsman took the view that, at first sight, the invitation for tender in question did not comply with the principles of good administration. He expected an adequate explanation from the Commission in this regard.

53. In its reply to the friendly solution, the Commission appeared to take the view that two factors justified the absence of more complete and specific information in the invitation for tender. These factors are: (i) that Article 237 [5] of the Implementing Provisions derogates by Article 143 (ii) that Article 251 of the Implementing Provisions, which applies **specifically** to the tenders covered by the Commission's external actions, does not specify the modalities of the submission of bids. It only states that " *the tenderers must reach the contracting authority at the address and by no later the date and the time indicated in the invitation to tender.* "

54. The Ombudsman thanks the Commission for this explanation and agrees that, in the



invitation for tender in question, the designation of the time when the Delegation actually received the tenders as the formal deadline for that tender procedure was not inconsistent with the Implementing Provisions.

55. In the Ombudsman's view, however, this does not change the fact that the invitation for tender in question should have been more precise and should have indicated: (i) the working hours of the Delegation, and (ii) that the delivery of the bids by private and official post could be attested by the same kind of evidence, such as, for example, the date of a deposit slip.

56. The Ombudsman constantly takes the view that the term 'maladministration' constitutes a broader concept than illegality. Therefore, the fact that a decision was adopted without breaching the law does not necessarily mean that it was adopted in conformity with the principles of good administration. Moreover, in the present case, because the modalities of submission of bids foreseen in Article 251, which is included in the Part entitled 'Special Provisions', was silent in this respect, it would have been reasonable for the Commission to rely on Article 143, which is included in the Part entitled 'Common Provisions' of the Implementing Provisions, when laying down such modalities of submission. In other words, even if special rules derogate from the application of the general rules, the former may be interpreted in light of the common provisions, if the special rules are too general and not sufficiently precise.

57. In light of the above, the Ombudsman considers that by failing to indicate, in the invitation for tender, (a) the Delegation's working hours and (b) that the delivery of bids by private and official post could be attested by the same kind of evidence, such as, for example, the date of a deposit slip, the Commission did not provide the tenderers with information which was as complete as possible. This was an instance of maladministration. Accordingly, the Ombudsman will make a critical remark below.

58. As regards his proposal, put forward in the context of the friendly solution, for the Commission to pay for the costs which the complainant incurred in order to participate in the tender procedure, the Ombudsman notes the Commission's statement in its reply that the *Terms and conditions of carriage* of the private courier contracted by the complainant provided an obligation for it to leave, in the parcel's place of destination, a notice about a failed delivery, such as a deposit slip. The private courier failed to do so in the present case.

59. The Ombudsman further understands that, on the basis of the Commission's reply, if this had been the case, the Commission would have considered the delivery by private post as successfully accomplished, even if the signed and dated receipt had not been given to the private courier.

60. In light of the Commission's above explanation, the Ombudsman agrees that no payment should be made to the complainant because, were it not for the behaviour of the private courier, the Commission would have treated, in the present case, the delivery of bids by private and official post in the same manner and would have accepted the complainant's bid.



B. Conclusions

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

By failing to indicate, in the invitation for tender, (a) the Delegation's opening times and (b) that the delivery of bids by private and official post could be attested to by the same kind of evidence, such as, for example, the date of a deposit slip, the Commission did not provide the tenderers with information which was as complete as possible. This was an instance of maladministration.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 4 December 2009

[1] 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.

[2] Article 130(2) a of the Implementing provisions reads as follows: "*The invitation to tender or to negotiate or to take part in the dialogue shall at least: (a) specify the rules governing the lodging and presentation of tenders, including in particular the closing date and time for submission, any requirement as to the use of a standard reply form, the documents to be attached, including those in evidence of financial, economic, technical and professional capacity referred to in Article 135 if they are not specified in the contract notice, and the address to which they must be sent;*"

[3] Article 3(5) of the Statute of the European Ombudsman provides that: "*as far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complainant.*"

[4] Case T-160/03 *AFCO Management Consultants v Commission*, judgment of 17 March 2005, not yet published in the ECR, paragraph 120.

[5] The first paragraph of Article 237 reads as follows: "*Articles 118 to 121, with the exception of the definition, Article 122(3) and (4), Articles 123, 126 to 129, 131(3) to (6), Article 139(2), Articles 140 to 146, Article 148 and Articles 151, 152 and 158a of this Regulation shall not apply to procurement contracts concluded by or on behalf of the contracting authorities referred to in points (a) and (b) of Article 167(1) of the Financial Regulation. The implementation of the procurement provisions under this Chapter shall be decided by the Commission.*"

