

Decision of the European Ombudsman closing the inquiry into complaint 1922/2010/(VIK)ER against the Publications Office of the European Union

Decision

Case 1922/2010/ER - **Opened on** 07/10/2010 - **Decision on** 19/12/2013 - **Institution concerned** Publications Office of the European Union (No maladministration found) |

The background to the complaint

1. The present case concerns the decision of the Publications Office of the European Union (the 'Publications Office') not to renew a service contract concluded with the complainant.
2. The complainant is an information technology and communications company. In 2007, it won a call for tenders launched by the Publications Office for the development, maintenance and support for information systems based on web technology (the 'Contract'). The Contract was signed in September 2007. It stipulated that it would last for a period of two years with the possibility, unless the Publications Office decided otherwise, of two automatic renewals, each for one year. In September 2009, the Contract was automatically renewed for one year.
3. On 23 April 2010 an employee of the complainant asked for a meeting with the official at the Publications Office responsible for the management of the Contract. This was in order to review with him the Publications Office's plans and future activities related to the Contract, including the possibility of adding new activities. The meeting took place on 26 April 2010. On 4 May 2010, the complainant's business manager sent a follow-up e-mail to the official, in which he thanked the official for the meeting, provided some technical information and said that he had told his colleagues about the "*Publications Office's plans for the normal continuation of the Contract, as well as its planned normal extension into 2011 (following the Contract's normal foreseen extensions scheme)*".
4. On 3 June 2010, the Publications Office informed the complainant that, in accordance with Article I.2.5 of the Contract, it did not wish to renew the Contract for another one-year period.
5. In the exchange of correspondence that followed, the complainant expressed its surprise at the Publications Office's decision and asked it to clarify the reasons justifying it. The complainant pointed out that the decision was at odds with the information received during the



meeting on 26 April 2010. The complainant also referred to what it considered to be the Publications Office's standard practice to renew all its framework contracts for their full possible duration.

6. On 25 June 2010, the Publications Office confirmed its decision and underlined that it had no standard practice concerning the renewal of framework contracts. The Publications Office pointed out that the decision not to renew the Contract was taken on the basis of the particular circumstances of the case and the needs of the institution. In particular, the decision was taken due to the budget being exhausted.

7. On 26 August 2010, the complainant turned to the European Ombudsman.

The subject matter of the inquiry

8. The Ombudsman opened an inquiry into the following allegation:

Allegation

By failing to comply with its assurances to the complainant that the Contract would be prolonged and by not respecting its standard practice in that area, the Publications Office infringed the principle of legitimate expectations, as laid down in Article 10 of the European Code of Good Administrative Behaviour.

The inquiry

9. On 7 October 2010, the Ombudsman requested the Publications Office to submit an opinion on the complainant's allegation by 31 January 2011. The Publications Office's opinion was forwarded to the complainant with an invitation to make observations, which the complainant sent on 31 May 2011.

10. After a careful analysis of the Publications Office's opinion and the complainant's observations, the Ombudsman concluded that it was appropriate to inspect the Publications Office's file in this matter. The inspection was carried out by the Ombudsman's services on 9 July 2013. A copy of the inspection report was sent to the Publications Office, and a copy was sent to the complainant with an invitation to submit observations. The complainant submitted its observations on the inspection report on 7 October 2013.

The Ombudsman's analysis and conclusions

Preliminary remarks



11. In its observations on the inspection report, the complainant argued that the Publications Office had unreasonably allocated a very low budget to the Contract. According to the complainant, the budget was inadequate in respect of the services required according to the tender specifications.

12. In this regard, the Ombudsman recalls that the object of her inquiry in the present case is limited to assessing whether the Publications Office violated the complainant's legitimate expectations. The issue raised in point 11 by the complainant is a new allegation on which the Publications Office was not asked to provide an opinion. While the Ombudsman does not consider that the present inquiry should be prolonged by asking for an additional opinion, she recalls that the complainant remains free to send her a new complaint on this specific point.

13. In a letter attached to its observations on the Publications Office's opinion, the complainant also asked the Ombudsman to open a new inquiry concerning the Publications Office's general behaviour. In its letter, the complainant referred to a number of examples concerning the way in which the Publications Office had concluded or managed contracts with the complainant and with other contractors. According to the complainant, those examples, which in some cases either the Ombudsman has inquired into, such as in the present case, or have been brought before the General Court, attest to the Publications Office's systematically hostile behaviour towards the complainant which is deliberately aimed at terminating contracts being performed by the complainant and at excluding it from new tenders.

14. The examples reported by the complainant included: (i) the refusal to renew valid contracts (such as in the present case); (ii) the decision neither to use a framework contract nor to refinance its budget; (iii) the transfer of contracts concluded with the complainant to other contractors; (iv) the overuse of contracts concluded with other contractors; and (v) the alleged existence of conflicts of interests. The complainant also referred to an anonymous letter sent on 2 June 2010 informing it that the Publications Office took a decision to exclude the complainant from all the contracts and projects being carried out and to transfer those contracts to other contractors. The complainant reiterated its position in its observations on the inspection report.

15. In the letter of 20 June 2013 announcing the decision to carry out an inspection of the Publications Office's file, the Ombudsman informed the complainant that a decision on whether to include the allegation mentioned in point 14 would be taken. This would be in case the assessment of the present case led to the conclusion that there was maladministration on the part of the Publications Office and that this maladministration could form part of a general pattern of maladministration by that office. The Ombudsman therefore will consider the issue following her assessment of the allegation set out in point 8.

16. In its observations on the Ombudsman's inspection report, the complainant called into question the Publications Office's decision to identify several of the documents inspected by the Ombudsman as confidential.

17. The Ombudsman recalls that according to Articles 13.3 and 14.2 of the Implementing



Provisions of the European Ombudsman, neither the complainant nor the public may have access to any documents or information obtained during an inspection and which have been identified by the institution in question as confidential. It follows that institutions may request that documents obtained during an inspection by the Ombudsman's services be treated confidentially. Given that the complainant did not submit any specific arguments suggesting that the Publications Office would not have been entitled to request confidentiality in the present case, the complainant's view is not tenable.

A. Allegation of failure to comply with the assurances given to the complainant and standard practice

Arguments presented to the Ombudsman

18. The complainant alleged that the Publications Office infringed the principle of legitimate expectations. According to the complainant, the Publications Office provided precise assurances regarding the renewal of the Contract during the meeting of 26 April 2010. At that meeting it also asked the complainant to make "*important and irreversible investments in advance*". As a consequence, the complainant was confident that the Contract would be renewed and made the required investments, which were considerable, in order to have the relevant resources in place to undertake the work. The complainant pointed out that the assurances provided during the meeting of 26 April 2010 were confirmed in the follow-up e-mail that it sent to the Publications Office on 4 May 2010. That e-mail could be considered to constitute the minutes of the meeting and clearly reported the Publications Office's intentions to renew the Contract. The complainant stressed that the Publications Office never reacted to the e-mail of 4 May 2010 or disputed its content.

19. The complainant also argued that a legitimate expectation that the Contract would be renewed ensued from the standard contractual practice of EU institutions and specifically of the Publications Office which always renews framework contracts for their entire possible duration. In this specific case, the complainant's expectation was reinforced by the fact that the Contract was actively used to provide maintenance services for a number of critical IT applications in use at the Publications Office.

20. In its opinion, the Publications Office denied having given the complainant any assurance about the renewal of the Contract during the meeting of 26 April 2010 or on any other occasion. The Publications Office stressed that during the said meeting the renewal of the Contract was not discussed at all and the only comment made in relation to the Contract was that it was "*in normal implementation*". The Publications Office also said that it had a file note dated 22 July 2010 summarising the content of the meeting.

21. The Publications Office further underlined that the complainant's e-mail of 4 May 2010 could not be considered to constitute the minutes of the meeting since they lacked the typical form that minutes take and only reflected the complainant's own perception of what had



happened and what had been said. Moreover, the Publications Office had not approved the content of the e-mail and its silence could not be considered as evidence of such approval. The Publications Office also recalled that according to the case-law of the Court of Justice of the European Union ('Court of Justice'), the "*absence of reaction from the Commission for a significant length of time cannot constitute an assurance which causes the applicant to entertain legitimate expectations*" [1] .

22. As regards the investments allegedly made by the complainant, the Publications Office denied ever encouraging the complainant to make them and stressed that the complainant was obliged to have the necessary resources available until the expiry of the Contract.

23. The Publications Office concluded that the complainant did not prove that it had received precise, unconditional and consistent assurances. However, even supposing that precise assurances had been given, the Publications Office stressed that those assurances could not give rise to legitimate expectations. This is because they would have been in clear contrast to the wording of the Contract which expressly recognised the Publications Office's right not to renew it and required any amendment to be made in writing.

24. The Publications Office also denied that it always renews its framework contracts as a matter of standard practice. The fact that the Publications Office systematically includes a renewal clause in its contracts does not mean that renewals are automatic. Rather they depend on a number of circumstances, including, for instance, the existence of a budget or the need for the services provided. In any case, the Publications Office stressed that the complainant failed to prove the existence of such a practice and that the figures at the Office's disposal in fact showed the opposite.

25. Moreover, the fact that active use was made of the Contract only reflected normal contractual behaviour during its validity, and could in no case be invoked to give rise to an expectation as to its renewal.

26. Finally, as regards the exhaustion of the relevant budget, the Publications Office stressed that it is not free to increase at its discretion the budget allocated to a public contract but can only do so when the conditions prescribed by the applicable rules are fulfilled.

27. In its observations, the complainant insisted that, during the meeting on 26 April 2010, the renewal of the Contract was discussed in detail. It submitted that the Publications Office provided precise, unconditional and consistent assurances that the Contract would be renewed for one more year. According to the complainant, if the issue had not been discussed at all, as the Publications Office suggested, it was difficult to understand why the Publications Office did not react to the e-mail of 4 May 2010. The complainant pointed out that the file note of 22 July 2010 mentioned by the Publications Office was written only months after the meeting and after the complainant's request for clarifications. The complainant suspected that the note had been drafted some time later in an attempt to justify the Publications Office's position and was therefore unreliable.



28. The complainant further added that the assurances provided during the meeting were latest of a long line of similar ones received. Due to the importance of the issue of the renewal, the complainant had kept raising it since 2008 and the Publications Office constantly assured the complainant that there would be no problem in renewing the Contract.

29. The complainant also stressed that the case-law cited by the Publications Office on the legal significance of the absence of a reaction by an institution refers to different circumstances (for example, a request for an authorisation) and therefore is not relevant in the present case. Since the complainant's e-mail of 4 May 2010 merely recorded what was said during the meeting, the silence of the Publications Office had to be considered as tacit acceptance of the report.

30. The complainant insisted that the renewal of framework contracts is a standard practice of the institutions and stressed that the Publications Office failed to provide evidence to the contrary. According to the complainant, it is reasonable to expect contracting authorities to renew framework contracts in the absence of exceptional circumstances. The complainant agreed that the exhaustion of the budget, or no requirement for the services which are provided under the contract, are circumstances that could justify the decision not to renew a contract. However, it also stressed that neither of those two circumstances occurred in the present case.

31. In particular, the complainant pointed out that the Contract was mainly used to provide maintenance services for two web-based systems (EU Bookshop and e-notices) which were of crucial importance for the activities of the Publications Office. Moreover, the Publications Office had admitted in the context of other Ombudsman's inquiries that the budget available for the management of the two systems was considerable.

The results of the inspection of the Publications Office's file

32. In the course of the inspection, the Ombudsman's representatives consulted the documents included in the Publications Office's file and in particular the file note of 22 July 2010. The file note concerned the meeting with the complainant of 26 April 2010 and all internal documents concerning the decision not to renew the Contract.

33. The Publications Office's representatives clarified that calls for tenders are prepared well in advance of a contract's expiry date, in order to ensure coordination and continuity between the two contracts and to allow for a smooth handover. They underlined that framework contracts like the one in question are usually concluded for a duration of one/two years, with the possibility of renewal twice or three times for one year each, up to a maximum possible duration of four years. A certain budget ('envelope') is allocated to the contract in question in line with the award decision. A renewal of a contract within the four-year framework is considered only if there is enough money left in the envelope to allow so. As regards the complainant's case, the expenditure was higher than previously envisaged. An extra allocation of funds had already been decided in order to renew the Contract once at the end of the second year. The Publications Office's representatives stressed that the money left in the increased envelope was



insufficient for the renewal of the Contract for one more year and that, under the circumstances, a second extra allocation could not be envisaged. The Publications Office's representatives clarified that an extra allocation of funds is an exceptional measure. In such circumstances, the decision was taken not to renew the Contract and to launch a new call for tenders.

34. The Publications Office's representatives also provided clarifications concerning the file note of 22 July 2010, the reasons why it was only drafted three months after the meeting with the complainant of 26 April 2010, and the issues discussed during that meeting. In particular, the Publications Office's representatives explained that minutes of meetings like the one in question are rarely drafted. In the present case, the meeting concerned several issues, including feedback on the performance of existing contracts with the complainant. However, the issue of a possible renewal of the Contract was not even touched upon. Contractual issues were not discussed during the meeting. The Publications Office's representatives added that the file note was drafted in response to the complainant's fax of 3 June 2010 in which it expressed its disagreement with the Publications Office's decision not to renew the Contract. The aim of the file note was to clarify what actually had been discussed at the meeting.

35. As regards the reason why the Publications Office did not reply to the complainant's e-mail of 4 May 2010, its representatives clarified that the Publications Office did not deem it appropriate to disclose the proposed decision not to renew the Contract, because that decision still had to be finally approved. It also clarified that the decision would soon have been officially communicated.

36. In its observations on the Ombudsman's inspection report, the complainant stressed that, according to its own experience, all framework contracts are concluded for at least four years, if not longer. It pointed out that the procedure leading to the award of a framework contract is particularly onerous both for the participants and the contracting authority and therefore a term of four years is absolutely necessary to allow all the stakeholders to have a return on their investments.

The Ombudsman's assessment

37. The Ombudsman recalls that the principles of good administration are also binding on institutions when they act in the framework of contractual agreements concluded with individuals. It follows that, even when institutions exercise their rights flowing from the terms of a contract, they are required to do so in conformity with the principles of good administration.

38. The Ombudsman recalls also, however, that the scope of the review that she can carry out in contractual cases is, as a matter of necessity, limited. The Ombudsman considers that she should not try to determine whether there has been a breach of contract by either party, if the matter is in dispute. This question could be dealt with effectively only by a court of competent jurisdiction, which would have the possibility of hearing the arguments of the parties concerning the relevant law and of evaluating conflicting evidence on any disputed issues of fact.



39. The Ombudsman therefore takes the view that, in cases concerning contractual disputes, she is justified in limiting her inquiry to the examination of whether the EU institution or body involved has provided her with a coherent and reasonable account of the legal basis for its actions and why it believes that its view of the contractual position is justified. If that is the case, the Ombudsman's conclusion would be that her inquiry has not revealed an instance of maladministration. That conclusion would not affect the right of the parties to have their contractual dispute examined and determined by a court of competent jurisdiction.

40. The Ombudsman notes that the principles of good administration include the principle of legitimate expectations which has been enshrined in Article 10 of the Code of Good Administrative Behaviour (the 'Code'). According to that principle, officials shall respect the legitimate and reasonable expectations that members of the public have in light of how the institution has acted in the past. They shall also be consistent in their administrative behaviour as well as with the administrative action of the institution.

41. The Ombudsman recalls that, according to established case-law of the Court of Justice [2] , three conditions must be satisfied in order to claim entitlement to the protection of legitimate expectations. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Union authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules.

42. In the present case, the complainant argues that it has a legitimate expectation to the renewal of the Contract as a consequence of: (i) the assurances given to the complainant by a Publications Office's representative during the meeting of 26 April 2010 and on a number of other occasions since 2008; and (ii) the normal contractual practice of EU institutions and specifically of the Publications Office concerning the renewal of framework contracts.

43. As regards (i) the assurances allegedly offered by the Publications Office, the Ombudsman notes that the complainant said that it received several of these on a number of occasions since 2008. However, the complainant only provided details of the meeting held on 26 April 2010 and did not submit any specific evidence or information on what it referred to as further examples of assurances received. As a consequence the Ombudsman will limit her assessment to the Publications Office's conduct in relation to the meeting of 26 April 2010.

44. The Ombudsman notes that the complainant and the Publications Office have expressed opposing views concerning what was discussed at the meeting.

45. In its opinion, and specifically during the inspection, the Publications Office states that they discussed several issues concerning the performance of existing contracts with the complainant's representatives but no reference was made to the possible renewal of the Contract. The Ombudsman points out that the Publications Office's position is confirmed by the content of the file note of 22 July 2010 which the Ombudsman's services have inspected.



46. The complainant, however, called into question the reliability of the file note of 22 July 2010 which was drafted by the Publications Office several months after the meeting took place. The complainant also underlined that the Publications Office did not react to its e-mail of 4 May 2010 which should be considered as an implicit confirmation that reassurances had been given during the meeting.

47. The Ombudsman considers that the fact that the file note was drafted more than two months after the meeting took place could indeed raise some doubts as to its reliability. However, it emerged at the inspection of the Publication Office's file that a proposal not to renew the Contract had already been submitted well before the date of the meeting with the complainant and that it was finalised a few days later. Under these circumstances, the Ombudsman considers it to be unlikely that the representative of the Publications Office, who took part in the meeting and who must have been well aware of the ongoing internal procedure, would have provided assurances that the Contract would be renewed.

48. The Ombudsman also notes that, during the inspection, the Publications Office provided an explanation of the reasons why it did not react to the complainant's e-mail of 4 May 2010. In particular, the Publications Office's representatives clarified that, as of that date, the final decision had not yet been taken but was soon to be, and therefore it did not consider it appropriate to disclose the Office's intention. The Ombudsman considers the Publications Office's clarification to be plausible and in line with the documentary evidence. She therefore takes the view that, under the circumstances, the lack of reaction to the complainant's e-mail of 4 May 2010 could not be considered as a tacit agreement to its content by the Publications Office, as suggested by the complainant.

49. Having said that, the Ombudsman takes the view that nothing would have prevented the Publications Office from replying to the complainant's e-mail of 4 May 2010. In that reply it could have informed the complainant of the timeframe for deciding on whether or not to renew the Contract. This could have been done without disclosing the then ongoing internal decision-making process. The Ombudsman will therefore make a further remark in this regard in order to provide guidance if similar cases arise in the future.

50. In light of the above, the Ombudsman concludes that the complainant's view that the Publications Office provided the alleged reassurances during the meeting of 26 April 2010, is not convincing.

51. As regards (ii) the complainant's reference to what it considers to be a standard contractual practice of EU institutions to renew framework contracts, the Ombudsman notes that the Publications Office has provided a reasonable explanation that there is no such practice. In this regard, it should be noted that the Publications Office argued that the inclusion of renewal clauses in contracts excludes the possibility of interpreting renewals as being automatic. The Publications Office has also said that the figures it has available do not point to a general practice of renewing framework contracts.

52. The Ombudsman notes that the complainant did not make any specific argument that



would call the Publications Office's position into question. To start with, the complainant merely said that the alleged practice exists, referred to its own experience and mentioned the economic reasons that, according to it, would make the automatic renewal of framework contracts necessary. Moreover, in its observations the complainant also acknowledged that there are cases in which framework contracts are not renewed, and in particular agreed that a decision not to renew a framework contract can be justified in cases where there is no longer a need for the services offered or where the relevant budget is exhausted. The Ombudsman notes that in the present case the Publications Office decided not to renew the Contract on the grounds of the exhaustion of the allocated budget. The Ombudsman concludes, therefore, that the arguments put forward by the complainant seem to confirm, rather than contradict, the conclusion of the Publications Office that there is no standard practice when it comes to the renewal of framework contracts. It appears useful to add that this finding is not affected by the complainant's views that: (i) the Contract was actively used to provide services which were highly necessary; and (ii) it needed to make certain investments. Given that (i) and (ii) concern the period of validity of the Contract, they could not give rise to legitimate expectations that the Contract would be renewed.

53. In light of the above, the Ombudsman concludes that no infringement of the principle of legitimate expectations could be established in the present case. It follows that the complainant's allegation cannot be sustained.

B. Allegation of existence of a general pattern of maladministration

54. Concerning the complainant's further allegation, submitted in his observations (see point 15), namely, the Publications Office's systematically hostile behaviour towards the complainant, the Ombudsman considers that as she has not found an instance of maladministration in the present case, she is unable to consider it as an example of the alleged systemic, hostile behaviour against the complainant. She therefore considers that, in the absence of concrete evidence, there are insufficient grounds for an inquiry into this allegation.

C. Conclusions

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

There has been no maladministration in the Publications Office's activities.

The complainant and the Publications Office will be informed of this decision.

Further remark



Subject to the terms of the contract, in future cases in which contractors ask whether or not their contract will be renewed, the Publications Office could at least indicate the approximate timeframe within which it intends to take a decision

Emily O'Reilly

Done in Strasbourg on 19 December 2013

[1] Joined cases T-407/06 and T-408/06 *Zhejiang Aokang Shoes v Council* [2010] ECR-747, paragraph 101.

[2] Case T-203/97 *Forvass v Commission* [1999] ECR-SC I-A-129 and II-705, paragraph 70; Case T-199/01 *G v Commission* [2002] ECR-SC I-A-217 and II-1085, paragraph 38; Case T-347/03 *Branco v Commission* [2005] ECR II-2555, paragraph 102.