

Draft recommendation of the European Ombudsman in complaint 642/2008/TS against the European Commission

Recommendation

**Case 642/2008/(TS)(ELB)MMN - Opened on 17/04/2008 - Recommendation on 16/09/2010
- Decision on 11/09/2012**

THE BACKGROUND TO THE COMPLAINT

1. The complainant, enterprise A, took part in a tender procedure for a service procurement contract (hereinafter, 'the contract'). The aim of the contract was to provide development assistance to country X [1]. Enterprise A was one of seven shortlisted tenderers.
2. On 9 December 2007, the Evaluation Committee received an anonymous fax message containing details of an exchange of e-mails between another shortlisted tenderer, enterprise B, and Mr C, who acted as a technical assessor and advisor to the Evaluation Committee. The e-mails indicated that Mr C had worked for enterprise B's Project Implementation Unit in September 2006.
3. On 10 December 2007, the Evaluation Committee held a meeting to discuss the correspondence received on 9 December 2007. On 12 December 2007, the Commission's Delegation to country X requested Mr C to clarify his connections with enterprise B.
4. On 15 December 2007, Mr C replied, stating that he had worked for all seven shortlisted tenderers, and not only for enterprise B. As regards enterprise B, he clarified that he had worked for it as an independent consultant in June, September and October 2006.
5. On 17 December 2007, the Commission requested enterprise B to explain its connection with Mr C. On 18 December 2007, enterprise B informed the Commission that Mr C had worked for it as an independent expert for thirteen days during 2006 on two projects, Project 1, and Project 2, respectively.
6. By letter dated 31 December 2007, the Commission informed the complainant that its tender was unsuccessful and that the contract was awarded to enterprise B. The letter contained a table setting out the average scores awarded to the complainant and enterprise B under the



award criteria [2] .

7. On 3 January 2008, the complainant wrote to the Commission, alleging that the Evaluation Committee breached the principle of equal treatment. In particular, it stated that one of the Evaluation Committee members, Mr C, had recently been employed by the selected tenderer. It also stated that the Commission's Delegation had lost the complainant's original expression of interest.

8. By letter dated 24 January 2008, the Commission replied to the complainant. As regards the alleged impartiality, the Commission first stressed that Mr C attended the Evaluation Committee meetings as an "observer", acting as a technical advisor to the members of the Evaluation Committee. He did not have any voting power. The Commission further stated that Mr C had clarified that he had worked with all of the consortia participating in the tender procedure, including the complainant. The Commission drew attention to the fact that the complainant was awarded the highest score in the technical evaluation, but that the price it quoted was significantly higher than quotes received from other tenderers.

9. On 5 March 2008, the complainant turned to the European Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY

10. The Ombudsman opened an inquiry into the following allegations and claim.

Allegations :

- The Commission failed to ensure compliance with the principle of equal treatment, because one of the advisors of the evaluation committee, namely, Mr C, had been recently employed by the successful tenderer.
- The Commission failed to handle appropriately the complainant's original Expression of Interest for the project concerned, which was lost after having been received by the Delegation.

Claim :

The complainant claimed that the tender should be cancelled and re-launched.

THE INQUIRY

11. The complaint was forwarded to the President of the Commission. The opinion provided by the Commission was then forwarded to the complainant with an invitation to make observations. The complainant did not submit any observations. Subsequently, the Ombudsman inspected the file at the Commission's premises. The inspection report was sent to the complainant for comments. The complainant did not submit any comments.



THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Allegation that the Commission failed to ensure compliance with the principle of equal treatment and the claim that the tender should be cancelled and re-launched

Arguments presented to the Ombudsman

12. In its opinion, the Commission first explained that, because of the complex technical nature of the tenders, the Evaluation Committee required the assistance of a technical advisor for the evaluation process. Mr C, an independent consultant, was therefore employed as a technical assessor and advisor to the Evaluation Committee from 2 December 2007 until 6 December 2007, to provide it with an unbiased technical opinion that would enable it to select the best possible tender for the contract. The contract was to be funded by the Community Programme, and its aim was to strengthen quality management, infrastructure, and capabilities in country X.

13. The Commission argued that Mr C's attendance at the technical evaluation meetings of the Evaluation Committee did not breach the principle of equal treatment, since he attended these meetings only as a technical adviser to the Evaluation Committee, and not as one of its Members. As a technical adviser, he had no voting power, he did not award scores to the tenders submitted, and he did not sign the evaluation report. Moreover, the Commission pointed out that Mr C did not participate in the financial evaluation of the tenders, and he had no knowledge of the financial offers made by the companies. Therefore, the Commission claimed that Mr C could not have influenced the final result of the evaluation of the tenders.

14. In support of its position, the Commission also stated that, by signing the Declaration of Impartiality and Confidentiality on 2 December 2007 (prior to the commencement of the tender evaluation), Mr C declared that he was independent of all parties which stood to gain from the evaluation process.

15. The Commission stated that it reacted promptly to the allegations of impartiality by seeking clarifications from both Mr C and enterprise B immediately following the anonymous fax message of 9 December 2007.

16. Mr C clarified, by letter dated 15 December 2007, that he had worked for enterprise B as an independent consultant in June, September and October 2006. Furthermore, he also stated that he had previously worked for most of the companies participating in the tender procedure, and all of the shortlisted tenderers. These included the complainant, enterprise A, for whom he had worked intermittently for a total of almost two years between 1995-2004. Mr C also pointed out that he started working as an independent consultant in 2005, and that this position did not entail any hierarchical subordination to any of the companies who employed him. Mr C. further stated that he was not influenced by anyone during the time he acted as technical advisor to the members of the Evaluation Committee.



17. Enterprise B clarified that Mr C. worked for it as an independent consultant for 13 days during 2006, in the implementation of two projects. It stated that it no longer had any contractual, legal or financial relationship with Mr C.

18. The Commission pointed out that it considered the clarifications from Mr C and enterprise B to be satisfactory. Therefore, the Commission concluded that Mr C's participation did not contravene the principle of equal treatment as provided for in section 2.8.2 of the Practical Guide to contract procedures for EU external actions ('the Practical Guide').

The Ombudsman's assessment

Conflicts of Interest

19. Article 52(2) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities ('the Financial Regulation') [3] provides the following definition for 'conflict of interest':

" There is a conflict of interests where the impartial and objective exercise of the functions of a player in the implementation of the budget or an internal auditor is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with the beneficiary. "

20. Examples of acts which are likely to be vitiated by a conflict of interest within the meaning of Article 52(2) of the Financial Regulation are provided in Article 34 of 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 ('the Implementing Rules') [4] . One of these acts is granting oneself or others unjustified direct or indirect advantages.

21. Article 52(1) of the Financial Regulation [5] provides that

" All financial actors shall be prohibited from taking any measures of budgetary implementation which may bring their own interests into conflict with those of the Communities. Should such a case arise, the actor in question must refrain from such measures and refer the matter to the competent authority. "

22. The principle of equal treatment has been recognised in the case-law of the EU courts as a general principle of law [6] , the respect for which shall be ensured by the EU institution or body concerned with regard to each stage of the tender procedure for the award of a contract financed by the EU budget [7] . The principle of equal treatment, provided for in Article 89 of the Financial Regulation and in the case-law of the EU courts, is therefore fully applicable to the tender procedure concerned. Article 89 of the Financial Regulation provides that "[a] ll public contracts financed in whole or in part by the budget shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination. "



23. In support of its position that there was no breach of the principle of equal treatment, the Commission expressly relied on the wording of section 2.8.2 of the Practical Guide which provides as follows:

" All members of the Evaluation Committee and any observers must sign a Declaration of Impartiality and Confidentiality [...] . Any Evaluation Committee member or observer who has potential conflict of interest with any tenderer or applicant must declare it and immediately withdraw from the Evaluation Committee. He will be excluded from participating further in any capacity in the evaluation meetings. "

24. The Ombudsman notes that the Declaration of Impartiality and Confidentiality, referred to in the above-mentioned section 2.8.2 of the Practical Guide, must be signed by all members of the Evaluation Committee and any observers . Prior to the commencement of the evaluation procedure, Mr C had to sign a declaration of impartiality and confidentiality which read as follows:

" I, the undersigned, hereby declare that I agree to participate in the evaluation of the above-mentioned tender procedure. [...] I am independent [8] of all parties which stand to gain from the outcome of the evaluation process [9] . To the best of my knowledge and belief, there are no circumstances, past or present, or that could arise in the foreseeable future, which might call into question my independence in the eyes of any party ; and, should it become apparent during the course of the evaluation process that such a relationship exists or has been established, I will immediately cease to participate in the evaluation process. [...]" (Emphasis added)

25. The Ombudsman recalls that the OECD Guidelines for Managing Conflicts of Interest in the Public Service [10] provide the following definition of " *conflict of interest* ":

- An *actual* conflict of interest exists when there is a conflict between a public official's [11] public duty and his/her private interests, such as where the public official has private interests which could improperly influence the performance of their official duties and responsibilities.
- An *apparent* conflict of interest can be said to exist where, despite the fact that there is no *actual* conflict of interest, an impression exists that that a public official's private interests could improperly influence the performance of their duties.
- A *potential* conflict arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant official responsibilities in the future.

The Ombudsman considers that the above principles also apply to third parties who, as external advisors, participate in the decision-making of EU institutions.

26. In line with the OECD Guidelines, the Ombudsman has consistently taken the view that principles of good administration [12] and, in particular, the principle of equal treatment, require that European Union institutions ensure that no actual, potential or apparent conflicts of interests affect their work [13] .



27. In the present case, the Commission relied on two arguments to conclude that there was no conflict of interest. First, given his status and role, Mr C could not influence the Evaluation Committee in its evaluation of the tenders. Second, since Mr C had worked for *all* of the shortlisted tenderers, and not only for one of them, no breach of the principle of equal treatment could have occurred.

28. As regards the first argument, the Ombudsman notes that Mr C was not a member of the Evaluation Committee. This does not necessarily mean, however, that he had no influence on the Evaluation Committee's ultimate decision. Mr C was the Evaluation Committee's technical assessor and advisor. It could reasonably be expected that the Evaluation Committee would *use* his assessment when deciding on the quality of each tender. In this context, the Ombudsman points out that the Commission itself acknowledged the importance of Mr C's advice by explaining that, due to the technical complexity of the tenders to be evaluated (see paragraph 12 above), a technical advisor was needed for the tender evaluation process. Furthermore, the final scores of the tenderers were calculated on the basis of (i) a technical evaluation (for which Mr C provided the input), and (ii) a financial evaluation. In sum, it is reasonable to assume that Mr C's views influenced the final result.

29. The Ombudsman also notes that a close examination of the Practical Guide reinforces the view Mr C was indeed in a position to influence the final decision of the Evaluation Committee. The Practical Guide states the following:

" All members of the Evaluation Committee and any observers must sign a Declaration of Impartiality and Confidentiality [...]. Any Evaluation Committee member or observer who has potential conflict of interest with any tenderer or applicant must declare it and immediately withdraw from the Evaluation Committee. He will be excluded from participating further in any capacity in the evaluation meetings . " (Emphasis added)

In its letter of 24 January 2008 to the complainant, the Commission expressly stated that Mr C attended the Evaluation Committee meetings as an " *observer* ". Therefore, Mr C's role in the tender evaluation process obviously falls under the category of " *observer* " within the meaning of Section 2.8.2 of the Practical Guide. As such, it is clear that Mr D was also bound by the same requirements to be free of actual, apparent or potential conflicts of interests, like all other members and observers. It would be unusual to seek to obtain such a declaration from Mr D if he had no possibility of influencing the Evaluation Committee.

30. The Commission's second argument, that there could be no conflict of interest because Mr C had worked for *all* of the shortlisted tenderers, and not only for one of them, also fails to convince. The Ombudsman does not share the view that no conflict of interest could possibly exist simply because a person worked for *all* of the shortlisted tenderers. In fact, conflicts of interest may be all the more likely to arise where someone has worked for many of the parties involved in a tender [14] . Indeed, the Ombudsman takes the view that a member of an Evaluation Committee, or an observer of a tender evaluation procedure, who has worked, or who is currently working for *any* of the tenderers, may be considered, at the very least, as having an *apparent* conflict of interest.



31. The Ombudsman recognises that, hypothetically, there may be situations, for example, in highly specialised fields, where the only experts available are those who have worked for, or provided services to the firms seeking to win a tender. In such circumstances, the contracting authority might have no choice but to use an expert who has worked for, or provided services to one or more of the tenderers. However, the Ombudsman does not consider it probable that, in an area such as standardisation, there would be only one available expert. In any event, in order for the appointment of such an expert to be valid, it would have to be shown that it was impossible to find an expert with no connection with the tenderers. In the present case, no such efforts were made. Indeed, no argument has even been put forward to indicate that the Commission had no other option but to choose the expert concerned.

32. If, in a highly specialised field, the Commission were obliged to choose an expert who had connections with some of the tenderers, the Commission would need to make a special effort to ensure that the expert's work was not unduly affected by conflicts of interest. For example, it would need to ensure that the identity of the tenderers remained hidden from the expert when he/she examined the tenders. The Ombudsman has not been provided with any evidence to indicate that such measures were taken in the present case.

33. The Ombudsman notes that when Mr C signed the declaration he did not make any reservations, or refer to his previous working relations with the shortlisted tenderers.

34. In his letter dated 15 December 2007, Mr C stated that, prior to commencing his work as the technical assessor and advisor, he informed the Commission about his previous working relationships with all the enterprises associated with the shortlisted tenderers. This statement, if true, would lead to two conclusions.

First, Mr C did not understand the declaration which he was asked to sign, namely, that it required him to declare actual, *and* apparent and potential conflicts of interest. The Ombudsman has examined the declaration carefully. He takes the view that the declaration is not well-worded. This constitutes an instance of maladministration. The Commission should therefore review the wording of the declaration in order to ensure that, in future, it is perfectly clear that the expert should declare *all* actual, apparent and potential conflicts of interest [15]. The Ombudsman will therefore make a draft recommendation to that effect.

Second, if, prior to the commencement of the evaluation, the Commission had indeed been aware of the expert's working relationships with all the shortlisted tenderers, it should have taken the steps described in paragraph 32 above. The Ombudsman notes that the Commission did not argue that it would have been impossible for it to replace Mr C as the technical assessor and advisor to the Evaluation Committee. In view of this, the Ombudsman concludes that the Commission should have replaced Mr C as its technical assessor and advisor. The Ombudsman therefore finds that a second instance of maladministration occurred in so far as the Commission failed to take appropriate action when it became evident that there were multiple conflicts of interest between Mr C and the shortlisted tenderers. He will therefore also address this issue in his draft recommendation.



The complainant's claim

35. As regards the complainant's claim that the tender should be cancelled and re-launched, the Ombudsman notes the case-law of the EU courts [16] . According to the said case-law, if an institution receives allegations of a conflict of interest, it is obliged to carry out an investigation and subsequently decide on the possible action it should take.

36. In particular, it follows from the case-law of the EU courts that, if there is a conflict of interest between a member of an evaluation committee and a tenderer, the institution is obliged to act with due diligence. It has to take into account all the relevant information when it formulates and adopts its decision on the outcome of the procedure for the award of the tender at issue. This obligation derives in particular from the principles of sound administration and equal treatment [17] . If a conflict of interest is discovered between a tenderer and a member of an evaluation committee, the institution has some discretion to determine how the subsequent stages of the tender award procedure [18] are to be conducted.

37. The Commission did not provide the Ombudsman with any documentation or information regarding its investigation into the alleged impartiality following its receipt of the replies from Mr C and enterprise B. The Commission's arguments suggest that, when it received the replies from Mr C and enterprise B, it concluded that the principle of equal treatment could not possibly have been breached for the simple reason that Mr C had worked for all of the shortlisted tenderers, and not just one of them. The Commission proceeded with the tender procedure, and finally awarded the tender to enterprise B, without taking any further measures regarding the alleged impartiality.

38. In light of the above circumstances, the Commission should have carried out an investigation and, depending on the results, taken appropriate action. The Commission apparently never carried out an investigation. This failure constituted another instance of maladministration.

39. In light of the instances of maladministration identified in paragraphs 34 and 38, the Ombudsman has decided to make a corresponding draft recommendation, in accordance with Article 3(6) of the Statute of the European Ombudsman. The draft recommendation states that the Commission should order an ex-post evaluation of the tender, in accordance with Article 27(4) of the Financial Regulation, and inform the Ombudsman of its conclusions.

B. Allegation that the Commission failed to handle appropriately the complainant's original Expression of Interest for the project concerned

Arguments presented to the Ombudsman

40. In its opinion, the Commission apologised to the complainant for losing the latter's initial



tender. The Commission considered that the matter was rectified promptly, without any lasting adverse effect for the complainant, and that there was, therefore, no maladministration.

The Ombudsman's assessment

41. The Ombudsman welcomes the fact that the Commission acknowledged that its services lost the complainant's initial application, and that it apologised to the complainant for the inconvenience caused. Losing an initial application shows that it was not diligently handled. In the present case, however, the complainant did not show that the loss of its initial application caused it any material damage, apart from the inconvenience for which the Commission has apologised. The loss of the initial application did not, for example, have any consequences as regards the handling and evaluation of the tender which the complainant subsequently re-submitted. There are, therefore, no grounds to inquire further into the second allegation.

C. The draft recommendation

On the basis of his inquiry into this complaint, the Ombudsman makes the following draft recommendation to the Commission:

The Commission should order an ex-post evaluation of the tender procedure for the service procurement contract concerned, in accordance with Article 27(4) of the Financial Regulation, and inform the Ombudsman and the complainant of the result of its evaluation.

The Commission should reword the Declaration of Impartiality and Confidentiality to ensure that it clearly covers *all possible conflicts of interest*, namely, actual, potential, and apparent conflicts of interest.

The Institution and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Institution shall send a detailed opinion by 31 December 2010. The detailed opinion could consist of the acceptance of the draft recommendation, and a description of how it has been implemented.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 16 September 2010

[1] In particular, the service procurement contract aimed to provide country X with technical assistance for the harmonisation of technical legislation and the alignment of quality infrastructure in priority sectors, in order to enable it to make maximum use of existing and future trade agreements, and to facilitate its access to the WTO. The relevant service procurement notice stipulates that the maximum budget for the contract under the tender amounts to EUR X,XXX,XXX (<http://ec.europa.eu/europeaid/tender/data/XXX/XXXXXXXXX.htm>).



[2] The scores awarded to enterprise A, in accordance with the award criteria, were as follows: "Organisation and methodology": 43; "Key expert 1": 19,00; "Key expert 2": 11,67; "Key expert 3": 13,67; ("Total experts": 44,33) "Technical score x 0,80" 80,00%; "Financial score x 0,20": 17,44%; "Overall score": 97,44%.

The scores awarded to enterprise B, the selected tenderer, were as follows: "Organisation and methodology": 44,33; "Key expert 1": 15,67; "Key expert 2": 11,33; "Key expert 3": 13,67; ("Total experts": 40,67) "Technical score x 0,80": 77,86; "Financial score x 0,20": 20%; "Overall score": 97,86%.

[3] OJ 2002 L 248, p. 1-48.

[4] OJ 2002 L 357, p 1-71. Article 34 of the Implementing Rules contains the following provision:

" Definition of a conflict of interests

(Article 52(2) of the Financial Regulation)

1. Acts likely to be vitiated by a conflict of interests within the meaning of Article 52(2) of the Financial Regulation may, inter alia, take one of the following forms:

(a) granting oneself or others unjustified direct or indirect

advantages;

(b) refusing to grant a beneficiary the rights or advantages to

which that beneficiary is entitled;

(c) committing undue or wrongful acts or failing to carry out

acts that are mandatory. [...]"

[5] 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. 1-48.

[6] Case C-57/01 *Makedoniko Metro* [2003] ECR I-1091.

[7] Case T-160/03 *AFCon v Commission* [2005] ECR II-981; Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR I-5469 and Case T-54/99 *max.mobil v Commission* [2002] ECR- II-313.



[8] The declaration includes, at this point, the following footnote: "*Taking into consideration whether there exists any past or present relationship, direct or indirect, whether financial, professional or of another kind.* "

[9] The declaration includes, at this point, the following footnote: "[i] *.e all [tenderers / applicants] who are participating in the [tender / call for proposals], whether individuals or members of a consortium, or any of the partners or subcontractors proposed by them [...]*".

[10] See <http://www.oecd.org/dataoecd/13/22/2957360.pdf> [Link]

[11] The term "public official" can, in the present context, be applied to any person exercising a public function.

[12] The principle of equal treatment is enshrined, as a principle of good administration, in Article 8 of the European Code of Good Administrative Behaviour as follows:

" Impartiality and independence

1. The official shall be impartial and independent. The official shall abstain from any arbitrary action adversely affecting members of the public, as well as from any preferential treatment on any grounds whatsoever.

2. The conduct of the official shall never be guided by personal, family or national interest or by political pressure. The official shall not take part in a decision in which he or she, or any close member of his or her family, has a financial interest. "

The European Parliament adopted a resolution approving the European Code of Good Administrative Behaviour on 6 September 2001.

The principle of equal treatment is also embodied in the Commission's Code of Good Administrative Behaviour as follows:

" Objectivity and impartiality

Staff shall always act objectively and impartially, in the Community interest and for the public good. They shall act independently within the framework of the policy fixed by the Commission and their conduct shall never be guided by personal or national interest or political pressure. "

The Commission adopted the above-cited Code of Good Administrative Behaviour on 13 September 2000.

[13] Decision of the European Ombudsman closing his inquiry into complaint 1341/2008/MHZ against the European Commission, at paragraph 28. The above-mentioned decision is available on the website of the European Ombudsman: <http://www.ombudsman.europa.eu> [Link]



[14] A person may be positively or negatively disposed towards companies for which s/he has previously worked, depending on the nature of the working relationship with each such company.

[15] The Ombudsman is also of the view that it is vital that experts make known *all* connections with tenderers *from the beginning of the relevant administrative procedure*. Such disclosure would permit the Commission to decide whether to consult another qualified expert, or, alternatively, to ensure that the expert receives only anonymised documents. Finally, such disclosure might help to reassure third parties, including tenderers, that the expert is acting in good faith. The Ombudsman considers that an apparent conflict of interest might actually even be reinforced if the expert does not provide full disclosure from the very beginning of a relevant administrative procedure, namely, by providing all relevant information, such as whether he/she worked, or provided services to firms participating in the tender.

[16] Case T-160/03 *AFCon v Commission* [2005] ECR II-981, paragraphs 75, 78, 79, 90 and 92.

[17] Case T-160/03 *AFCon v Commission* [2005] ECR II-981, paragraph 75.

[18] Case T-160/03 *AFCon v Commission* [2005] ECR II-981, paragraph 77.