

Decision of the European Ombudsman closing the inquiry into complaint 1005/2011/MMN against the European Commission

Decision

Case 1005/2011/MMN - **Opened on** 01/06/2011 - **Recommendation on** 09/10/2012 - **Decision on** 27/01/2014 - **Institution concerned** European Commission (Critical remark) |

The background to the complaint

1. The present case concerns a tender procedure for the provision of technical assistance and training to the Ministry of Agriculture, Food and Consumer Protection and to the National Food Authority in Albania. The Commission launched this tender procedure on 15 September 2010.
2. On 15 October 2010, the complainant (which was one of the shortlisted tenderers) indicated to the Commission that the inclusion among the shortlisted tenderers of an undertaking (hereinafter, 'company A'), which, at the time, was providing similar services to the same beneficiary, was unfair since company A had access to strategic information due to its participation in an ongoing similar project.
3. On 19 November, 23 November and 8 December 2010, the complainant wrote to the Commission indicating that company A's Team Leader for the ongoing project, who was also the proposed Team Leader for the new tender project (hereinafter, 'Mr P'), appeared to have drafted the Terms of Reference for the new tender. According to the complainant, this created a conflict of interest.
4. On 1 December 2010, the Commission informed company A that its tender bid had been selected. On 13 December 2010, the Commission sent company A the contract for signature. On 4 January 2011, the contract was returned to the Commission signed by company A.
5. On 27 January 2011, the Commission informed the complainant that it had awarded the contract to company A in a consortium including another undertaking. In that letter, the Commission stated that there was no conflict of interest since the involvement of Mr P in the preparation of the Terms of Reference " *was very residual and limited exclusively to providing background information* " for two sections (namely, section 1.4 entitled 'Current state of affairs in the relevant sector' and section 1.5 entitled 'Relevant programmes and other donor



activities').

6. According to the Commission, all the other sections of the Terms of Reference were drafted by the Contracting Authority (i.e., the EU Delegation to Albania) in consultation with the beneficiary. Furthermore, the Commission indicated that the reason why the 'document properties' of the electronic version of the Terms of Reference suggested that the author of the document was Mr P was the mere fact that the Contracting Authority and the beneficiary worked on a Word document which had been initiated by Mr P.

7. On 7 February 2011, the complainant replied to the Commission and requested a new investigation.

8. On 15 February 2011, the Commission wrote to the complainant confirming its finding that, in view of the evidence collected, there was no conflict of interest.

9. On 3 May 2011, the complainant lodged the present complaint with the Ombudsman.

The subject matter of the inquiry

10. On 1 June 2011, the Ombudsman opened an inquiry into the following allegation and claims:

Allegation:

The Commission failed to ensure compliance with the principle of equal treatment and failed to avoid a conflict of interest because an employee of the successful tenderer participated in the drafting of the Terms of Reference of the relevant public tender.

Claims:

(1) The Commission should annul (or terminate) the contract and organise a new tender procedure excluding the tenderer affected by the conflict of interest.

(2) The Commission should compensate for the harm suffered by the complainant.

The inquiry

11. On 28 September 2011, following a request for an extension of the deadline, the Commission provided its opinion, which was forwarded to the complainant for its observations.

12. On 31 October 2011, the complainant submitted its observations.



13. On 29 November 2011, the Ombudsman informed the parties that it was necessary to carry out an inspection of the file.
14. On 27 January 2012, the Ombudsman's services carried out the inspection of the file.
15. On 8 February 2012, the inspection report was sent to the parties. On the same date, the Ombudsman requested the Commission to provide a copy of the e-mail allegedly sent by Mr P to the EU Delegation in Albania in early June 2010, with his contribution for the Terms of Reference.
16. By letter dated 2 March 2012, the complainant submitted its observations on the inspection report.
17. On 2 May 2012, the Commission informed the Ombudsman that it had been unable to find the e-mail sent by Mr P.
18. On 4 May 2012, the complainant submitted additional observations concerning the Commission's failure to provide a copy of the above-mentioned e-mail.
19. On 9 October 2012, the Ombudsman made a draft recommendation.
20. On 29 January 2013, the Commission sent its detailed opinion on the Ombudsman's draft recommendation, which was forwarded to the complainant for observations.
21. On 27 February 2013, the complainant submitted its observations on the Commission's detailed opinion.
22. On 20 March 2013, the Commission sent information concerning its follow-up measures to the Ombudsman.

The Ombudsman's analysis and conclusions

Preliminary remarks

23. As a preliminary matter, the Ombudsman considers it appropriate to address the following three issues: first, the complainant's request for access to documents; second, the complainant's new allegation that the Commission committed an irregularity by signing the contract with company A before informing the complainant of the outcome of the tender; and, third, the option to impose sanctions on the Commission.
24. As regards the first issue, in its observations on the inspection report, the complainant disputed the Commission's confidentiality claim concerning certain documents examined during



the inspection. The complainant contended that the Commission should substantiate its confidentiality claim in relation to each specific document, in accordance with the rules on access to documents. Thus, it requested the Commission fully to disclose the documents in question, redacted where necessary to protect sensitive commercial information.

25. In the Ombudsman's view, this new claim put forward by the complainant was inadmissible for lack of appropriate prior administrative approaches with the Commission. If the complainant wished to pursue this matter, it should first make a request for access to documents to the Commission in accordance with Regulation 1049/2001. [1] If it does not receive a satisfactory reply in accordance with Regulation 1049/2001, the complainant could turn again to the Ombudsman.

26. Second, in its observations on the Commission's opinion, the complainant put forward a new allegation, namely, that the Commission committed an irregularity by concluding the contract with company A even before informing the unsuccessful tenderers of the tender's outcome.

27. The complainant noted that the Commission signed the contract with company A more than three weeks before it informed the complainant of the outcome of the tender procedure and of the assessment of its complaint. In this respect, the complainant considered that it is good administrative practice to inform unsuccessful tenderers of the outcome of the tender prior to the signature of the contract, in order to allow them to challenge the outcome before the contracting authority or, if necessary, before the courts. In support of this contention, it cited the EU Remedies Directive [2] which applies to national tender procedures and the Practical Guide to Contract Procedures for EU External Actions of 2010 (the 'Practical Guide'). [3]

28. Furthermore, the complainant indicated that the Commission's behaviour suggested that it wished to avoid complaints lodged in a timely fashion and to make the possibility of repairing any harm more difficult.

29. In its detailed opinion, the Commission referred to section 2(9)(3) of the Practical Guide ('Publicising the award of the contract'), which reads as follows:

" Regardless of the type of procedure, the Contracting Authority informs candidates and tenderers of decisions reached concerning the award of the contract as soon as possible, including the grounds for any decision not to award a contract.

[...]

In addition, regardless of the type of procedure, the Contracting Authority must:

- send the other tenderers a standard letter (Annexes B13, C8, and D8) within not more than 15 days from receipt of the countersigned contract;*
- record all statistical information concerning the procurement procedure including the contract*



value, the names of the other tenderers and the successful tenderer. "

30. Thus, the Commission took the view that it had complied with the Practical Guide in the present case since it had informed the complainant by letter of the results of the tender within 15 working days from the date on which it received the counter-signed contract from company A.

31. In its observations on the Commission's detailed opinion, the complainant noted that the provision referred to by the Commission established that tenderers should be informed 'as soon as possible' of decisions concerning the award of contracts. Thus, the decision to reject the complainant's tender should have been communicated to it immediately, as there was no reason to delay this.

32. At the time of the draft recommendation, the Ombudsman took the view that the arguments put forward by the complainant were reasonable. Therefore, under normal circumstances, this new allegation would merit an inquiry by the Ombudsman. However, as indicated below, the Ombudsman considered that there was already sufficient evidence to conclude that the Commission had committed an instance of maladministration in the present case. The Ombudsman confirms this view in the present decision. Given that a finding of maladministration has already been made as regards the original subject matter of the complaint, the Ombudsman considers that there is no need for further action concerning the complainant's new allegation.

33. Third, in its observations on the inspection report, the complainant appeared to request the Ombudsman to sanction the Commission. It added that the Ombudsman should envisage extraordinary measures in the present case.

34. In relation to this, the Ombudsman considers it useful to point out that her Statute does not give the Ombudsman the power to impose sanctions on the EU institutions which commit instances of maladministration.

A. Allegation of failure to comply with the principle of equal treatment and failure to avoid a conflict of interest

Arguments presented to the Ombudsman

35. In its complaint, the complainant alleged that the Commission failed to ensure compliance with the principle of equal treatment and failed to avoid a conflict of interest because an employee of the successful tenderer (company A) participated in the drafting of the Terms of Reference of the tender.

36. In this respect, the complainant referred to Article 89(1) of the Financial Regulation, [4] which establishes the following:



" All public contracts financed in whole or in part by the budget shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination. "

37. Moreover, the complainant pointed out that Article 94 of the Financial Regulation states as follows:

" Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:

(a) are subject to a conflict of interest;

(b) are guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the contract procedure or fail to supply this information. "

38. The complainant further relied on section 2(3)(6) of the Commission's Practical Guide which provides that *" any firm or expert participating in the preparation of a project (e.g. drafting of the Terms of Reference) must be, as a rule, excluded from participating in tenders based on this preparatory work, unless they can prove to the Contracting Authority that the involvement in previous stages of the project does not constitute unfair competition. "*

39. In the complainant's view, first, the fact that Mr P participated in the drafting of the Terms of Reference gave company A an unfair advantage in breach of the principle of equal treatment. In particular, it argued that, as the author of the draft Terms of Reference, Mr P could reasonably be expected to have provided company A with information and assistance in order to increase its chances of being selected in the tender procedure. The complainant emphasised that, even if Mr P did not have access to the Terms of Reference between the time he submitted the first draft and the time the final version was published, he was in a privileged position because he knew what he had proposed and also because the possibility to identify any departure from his proposal would have provided him with valuable information.

40. Second, the fact that Mr P participated in the drafting of the Terms of Reference put Mr P and company A in a situation of conflict of interest within the meaning of the Financial Regulation and the Practical Guide. The complainant further noted that company A was an experienced tenderer. Thus, when company A and Mr P signed their declarations of lack of conflict of interest they could not ignore these statements were misrepresenting the facts and therefore were in breach of the Financial Regulation.

41. Although the complainant acknowledged that the Practical Guide allows a tenderer to demonstrate that there is no conflict of interest, it stressed that company A did not make any such attempt.

42. Furthermore, the complainant argued that Mr P was, at least, in a situation of *apparent* conflict of interest within the meaning of the OECD Guidelines for Managing Conflicts of Interest



in the Public Service, which state that an " *apparent conflict of interest can be said to exist where it appears that a public official's private interests could improperly influence the performance of their duties but this is not in fact the case.* " [5]

43. The complainant noted that the concept of an apparent conflict of interest has been endorsed by the Ombudsman's decisional practice [6] and that there was no evidence that the Commission had no alternative but to request Mr P to participate in the drafting of the Terms of Reference. [7]

44. Finally, the complainant argued that the Commission did not properly investigate its allegations.

45. In its opinion, the Commission argued that there was no conflict of interest in the present case and that it had properly investigated the complainant's allegations.

46. As regards the existence of a conflict of interest, the Commission pointed out that, according to the case-law, there is a conflict of interest in a situation which, by its nature, can be reasonably understood, in the eyes of third parties, as a source of impairment of the independence of the person in question. [8]

47. In its view, before excluding a tenderer from a tender procedure, the Commission must be able to demonstrate that the consultant/expert who had previously worked for the Commission had access to documents which gave him a real competitive advantage over other tenderers. Moreover, the conflict of interest must be real, not hypothetical or a mere possibility. The risk of conflict of interest must be found to exist following a specific assessment. [9]

48. Furthermore, before being excluded, a tenderer must be given the possibility to demonstrate that the information obtained was not capable of distorting competition. [10]

49. In this context, as regards the case at hand, the Commission contended that the mere fact that company A had been awarded the ongoing contract in Albania should not in and of itself lead to its exclusion from the tender procedure. In the Commission's view, this would be disproportionate and contrary to the rights of company A, as well as contrary to the Commission's interests.

50. The Commission emphasised that the EU Delegation merely asked Mr P to provide some background information for sections 1.4 ('Current state of affairs in the relevant sector') and 1.5 ('Related programmes and other donor activities') of the Terms of Reference. The Commission added that in no manner did company A or any of its experts have access to other parts of the Terms of Reference. According to the Commission, no document for the preparation of Mr P's contribution was provided by the EU Delegation to Mr P.

51. The Commission further noted that sections 1.4 and 1.5 were generic in nature. The information contained in these sections was not confidential and was accessible to the public, in particular to the specialised economic operators which participated in the tender. The EU



Delegation asked Mr P to provide information for these sections because he was well-placed to know the latest developments in Albania.

52. In view of the foregoing, the Commission concluded that there was no conflict of interest.

53. As regards its investigation concerning the complainant's allegations, the Commission considered that it properly took the necessary investigative measures. In particular, the Commission pointed out that the day after receiving the allegations of conflict of interest it wrote to company A to request its views.

54. It emerged from the reply given by company A that, once Mr P was asked by the EU Delegation to contribute to sections 1.4 and 1.5 of the Terms of Reference, he downloaded from the Commission's website the standard model and inserted his contribution therein. After Mr P sent his contribution, the EU Delegation continued to work on the same electronic document. This version of events was confirmed by the member of the EU Delegation who was in charge of preparing the tender.

55. Furthermore, the Commission indicated that the evaluation committee examined the various drafts of the Terms of Reference. Following this examination, the evaluation committee concluded that the final version differed significantly from the original draft.

56. In view of this, the Commission concluded that it properly investigated the complainant's allegations. It added that it adequately informed the complainant of its investigation measures and of the reasons for its finding.

57. In its observations, the complainant stressed that, by the time company A and Mr P signed their declarations of lack of conflict of interest, they should have known that such statements were inaccurate.

58. The complainant further noted that, since a member of the EU Delegation to Albania requested Mr P to draft parts of the Terms of Reference, it was fair to assume that this person was a member of the evaluation committee or that at least this information should have been made known to the members of the evaluation committee. Since the EU Delegation itself requested Mr P to draft part of the Terms of Reference it should have considered of its own motion whether there was a conflict of interest. Yet the EU Delegation failed to fulfil its supervisory role by verifying the declarations of lack of conflict of interest.

59. In the complainant's view, the fact that company A knew before any other tenderer (due to Mr P's participation in the drafting of the Terms of Reference) that a new tender was going to be launched, gave it an advantage over other tenderers, in particular as regards the timing and the overall objectives of the tender. Having two months more than any other tenderer to prepare a tender bid is an important advantage, which was confirmed by the fact that company A obtained the highest score possible for the technical assessment of its bid.

60. Furthermore, since the request for assistance by the EU Delegation to Mr P was not made



in writing, it was impossible to verify what information was disclosed to Mr P.

61. The complainant further noted that there was no written evidence supporting the statement that Mr P only provided background information for sections 1.4 and 1.5 of the Terms of Reference.

62. In its observations on the inspection report, the complainant argued that the fact that the Commission did not have in the file a copy of the e-mail sent by Mr P to the EU Delegation with his input for the Terms of Reference implied that there had been no independent verification of company A's assertion that this input was limited to background information. This was contrary to the principles of good administration.

63. Furthermore, the complainant argued that a statement made by a member of the EU Delegation during the inspection suggested that the Delegation requested Mr P to provide 'ideas' and not only background information. In any event, it emphasised that the Commission did not seek any 'ideas' or 'background' information from the other tenderers, which was contrary to the principle of equal treatment and fairness.

64. Moreover, the complainant disputed another statement made during the inspection. This was, in the event that Mr P had provided background information only, that there would be no conflict of interest because the most important part of the Terms of Reference was the technical criteria for the selection of experts. The complainant put forward several reasons for its contention. For instance, as it already pointed out, the ability to identify any departure in the final Terms of Reference from his proposal would give Mr P (and company A) an advantage. Moreover, the complainant suggested that the fact that the member of the EU Delegation who made the request to Mr P was likely to be a member of the evaluation committee implied that this person could no longer be objective.

65. After the Commission acknowledged that it had been unable to find the e-mail sent by Mr P to the EU Delegation with the background information for the Terms of Reference, the complainant made the following observations.

66. First, it concluded that it had become clear that the Commission did not properly investigate the issue of the conflict of interest. It merely invited the successful tenderer to make a statement that there was no conflict of interest but never verified this assertion independently. The complainant argued that it was fair to assume that the tenderer would never have incriminated itself.

67. Second, while the complainant had demonstrated that the Terms of Reference had been drafted by Mr P, the Commission had been unable to substantiate with evidence its defence that his input was limited. Therefore, the complainant's allegation concerning the existence of a conflict of interest should be upheld in its entirety.

The Ombudsman's assessment leading to a draft



recommendation

68. In essence, the complainant argued that, first, the Commission infringed the principle of equal treatment by requesting Mr P (company A's Team Leader for the ongoing project, who was also the proposed Team Leader for the new tender project) to draft the Terms of Reference, at least in part. In the complainant's view, this conferred on company A an undue advantage in the tender procedure. Second, the complainant argued that the Commission failed to prevent a conflict of interest since Mr P drafted the Terms of Reference and was also the proposed Team Leader for the new project.

69. In its defence, the Commission argued, in a nutshell, that the principle of equal treatment had not been infringed and that it did not fail to prevent a conflict of interest because Mr P's involvement was limited to providing background information for two sections of the Terms of Reference.

70. For the purposes of the present analysis, the Ombudsman noted that Article 89(1) of the Financial Regulation establishes the principle of equal treatment and non-discrimination in the context of public tenders. Moreover, it follows from the case-law of the EU courts in the area of public tendering that "*the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.*" [11]

71. Furthermore, section 2(3)(6) of the Practical Guide provides that "*any firm or expert participating in the preparation of a project (e.g. drafting of the Terms of Reference) must be, as a rule, excluded from participating in tenders based on this preparatory work, unless they can prove to the Contracting Authority that the involvement in previous stages of the project does not constitute unfair competition.*"

72. As regards the allegation of existence of a conflict of interest, Article 94 of the Financial Regulation provides that public contracts cannot be awarded to tenderers which are subject to a conflict of interest or which are guilty of misrepresentation when supplying information.

73. According to Article 52(2) of the Financial Regulation "*[t]here 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.*"

74. Moreover, the OECD Guidelines provide the following definition of 'conflict of interest':

(i) An *actual* conflict of interest exists when there is a conflict between a public official's [12] 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.

(ii) 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 a public official's private interests could



improperly influence the performance of his/her duties.

(iii) 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.

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

76. Having carefully examined all the information that had been made available by the parties, the Ombudsman considered that the following conclusions could be drawn.

77. First, the complainant had demonstrated that Mr P participated in the drafting of the Terms of Reference. The Commission did not dispute this fact. In this respect, the Ombudsman noted that the Practical Guide clearly provides that any firm or expert participating in the drafting of the Terms of Reference must, in principle, be excluded from participating in the tender in question, unless they can prove to the institution that their involvement in previous stages of the project does not constitute unfair competition. Therefore, it was clear that the burden of proof rests on the firm or expert in question. Thus, failure to provide the required evidence should result in the exclusion of the firm or expert in question. In the Ombudsman's view, the Commission thus appeared to have failed to apply its own Practical Guide in the present case as neither company A nor Mr P seemed to have provided sufficient evidence to show that the latter's involvement did not give rise to unfair competition.

78. It was true that company A had made a statement according to which Mr P's involvement in the drafting of the terms of reference was very limited and therefore did not confer any undue advantage on it. This statement was apparently confirmed by the member of the EU Delegation who made the relevant request to Mr P and who received the latter's contribution. The Ombudsman considered that the doubts the complainant has expressed in this context were understandable. The fact that Mr P inserted his contribution on a template downloaded from the Internet and that the Commission then filled in the rest could be regarded as a rather unusual pattern of events. However, the Ombudsman considered it appropriate to put on record that the evidence that was made available was compatible with the account of events presented by the Commission.

79. Notwithstanding the above, the fact remained that there was no trace in the Commission's file, which the Ombudsman's services inspected, of the e-mail that, according to the Commission, Mr P addressed to the Delegation around June 2010 and which contained his contribution. Moreover, following an explicit request by the Ombudsman, the Commission indicated that it had been unable to trace this e-mail.

80. Second, in view of the fact that a member of the EU Delegation requested Mr P to participate in the drafting of the Terms of Reference, however limited this participation may have



been, the Commission should not have accepted (as it did) the declarations of lack of conflict of interest made by company A and Mr P without questioning their validity. Instead, it should have investigated of its own motion Mr P's exact involvement in the drafting of the terms of reference and added to the file all the written evidence that was relevant in this context.

81. Third, as the complainant argued, the fact that the request by the EU Delegation's member was expressed orally made it very difficult to ascertain the information which may have been disclosed to Mr P on this occasion so as to enable him to prepare his contribution. The Ombudsman considered that principles of good administration require that there should be a written record of such a request made by a Commission staff member.

82. Fourth, on the assumption that the account of events presented by the Commission was accurate, Mr P's involvement would nevertheless have given rise to an *apparent* conflict of interest. In the Ombudsman's view, principles of good administration require that the EU administration do all it could to avoid such situations.

83. In view of the foregoing considerations, the Ombudsman concluded that the Commission had failed properly to handle the issue of Mr P's involvement, which gave rise to an apparent conflict of interest. This constituted an instance of maladministration. It was therefore no longer necessary to examine whether the Commission also infringed the principle of non-discrimination.

The arguments presented to the Ombudsman after the draft recommendation

84. In its detailed opinion, the Commission disputed the Ombudsman's findings. The Commission insisted that the limited involvement of Mr P in the drafting of the Terms of Reference meant that there had been no conflict of interest and no breach of the principle of equal treatment.

85. As regards there being no trace of the e-mail that Mr P allegedly sent to the EU Delegation around June 2010, and which contained his allegedly limited contribution, the Commission indicated that, on 15 November 2012 (i.e., after the Ombudsman's draft recommendation), Mr P, who had not been directly involved in the preparation of the Commission's replies, signed a declaration of honour. This declaration confirmed that he had merely provided some background information for sections 1.4 ('Current state of affairs in the relevant sector') and 1.5 ('Related programmes and other donor activities') of the Terms of Reference. He added that he had downloaded the 'Word' template for the Terms of Reference from the EuropeAid website and inserted the requested information. Moreover, Mr P indicated that he had put the document on a USB memory stick, which he had given to the EU Delegation.

86. The Commission explained that this was why it could not find any trace of an e-mail containing the contribution. The Commission added that the relevant member of the EU Delegation had initially stated that he had no recollection of the transmission of the



above-mentioned 'Word' document by means of a USB stick. However, this person later confirmed that Mr P's declaration was a proper account of events.

87. The Commission acknowledged that it still could not provide written evidence of the limited involvement of Mr P in the drafting of the Terms of Reference.

88. It admitted that the background information for the Terms of Reference should have been obtained in a different manner and that the course of action adopted at the time was 'inappropriate and imprudent' because it entailed the risk of giving the impression of a potential conflict of interest. Therefore, the Commission indicated that it would take adequate measures to prevent this type of behaviour in EU Delegations in the future.

89. However, the Commission argued that section 6 ('Requirements') of the Terms of Reference was the most important section. It added that it had tried to draft the requirements for the team experts in a non-restrictive way in order to enhance competition between potential tenderers as much as possible. It provided copies of correspondence between the EU Delegation and the beneficiary which, in the Commission's view, showed that Mr P was not involved in the drafting of this section.

90. Moreover, the Commission pointed out that "*company A was inevitably part of the consultation process engaged by the EU Delegation to define the outline of the new technical assistance project.*" Thus, regardless of whether Mr P was involved in the drafting of the Terms of Reference or not, company A had *de facto* access to information relevant to sections 1 to 5. However, the Commission considered that this did not confer any unfair advantage on company A since it was a result of company A's participation in an ongoing similar project.

91. In view of the foregoing, the Commission submitted that there had been no maladministration in so far as the complainant's allegation was concerned.

92. In its observations, the complainant made the following comments.

93. First, it noted that the Commission now provided a new account of events (i.e., the document was provided by means of a USB stick rather than sent by e-mail). It also questioned the Commission's reliance on the statements of the relevant member of staff of the EU Delegation who initially declared having no recollection of the use of a USB stick and only subsequently changed his account of events.

94. Second, this change in the account of events also implied that the Commission did not properly investigate the matter at the time of the initial complaint since it did not even know how it had received the contribution from Mr P.

95. Third, since Mr P himself had admitted that he participated in the drafting of the Terms of Reference, regardless of the extent of this participation, he should have in any event made a declaration to that effect. However, the declarations signed by Mr P and company A at the time of the tender failed to indicate this. These declarations should thus be regarded as 'false' or at



least incomplete.

96. Fourth, the Commission could not show that Mr P's participation in the drafting of the Terms of Reference was limited. In that regard, the Commission relied exclusively on Mr P's own statement. However, in the absence of any objective corroborating evidence from other sources, the complainant questioned the reliability of that statement, given that Mr P was directly affected by the case and thus had a clear interest in confirming his allegedly limited involvement in the drafting of the Terms of Reference in question.

97. Fifth, the complainant also took issue with the Commission's suggestion that it was acceptable for a tenderer to draft parts of the Terms of Reference as long as the Commission subsequently worked on the parts which it considered to be the important ones. The complainant added that the Commission had not proven that section 6 (i.e. the most important section according to the Commission) had not been originally drafted by Mr P. It merely provided evidence to show that the EU Delegation made amendments to this section, which were, in addition, not substantive.

98. Sixth, the complainant emphasised that, according to section 2(3)(6) of the Commission's Practical Guide, the burden of proof that a tenderer's involvement in the preparation of the Terms of Reference does not lead to unfair competition lies with the tenderer in question. The complainant stressed that company A had failed to provide such evidence.

99. In view of the foregoing, the complainant requested the Ombudsman to confirm the finding of maladministration that had been made in the draft recommendation.

The Ombudsman's assessment after the draft recommendation

100. In its detailed opinion, the Commission maintained its position that what it considered to be Mr P's limited involvement in the drafting of the Terms of Reference was sufficient to reject the complainant's allegation.

101. The Ombudsman's draft recommendation already dealt with this argument and pointed out that there was insufficient evidence to show that Mr P's involvement was very limited (points 77-79 above). Moreover, the Ombudsman's draft recommendation was based on several additional considerations (points 80-82). The Ombudsman will consider these issues in turn.

102. First, in the draft recommendation, the Ombudsman pointed out that no trace of any e-mail exchange could be found regarding Mr P's allegedly limited involvement. In its detailed opinion, the Commission submitted that this was because Mr P's contribution had been provided by means of a USB stick. The Ombudsman notes that, even aside from the understandable doubts expressed by the complainant about the credibility of this modified account of events, which is supported only by the most recent statements made by Mr P and the relevant member of staff of the EU Delegation, the fact remains that the Commission still has no direct evidence that Mr P's involvement was, as alleged by the Commission, very limited. Moreover, the Commission



had no such evidence at the time when it should have examined this issue. In its detailed opinion, the Commission itself recognised that it does not have such evidence. This conclusion cannot be affected by the Commission's argument that the EU Delegation had actually drafted what, in its view, was the most important section of the Terms of Reference, namely section 6. As the complainant pointed out, there is no evidence that Mr P did not originally draft this section as well. The fact that the Commission may have subsequently fully or partly amended this section, as suggested, in the Commission's view, by certain documents it provided with the detailed opinion, is immaterial. The fact remains that the Terms of Reference were at least partly drafted by an expert who subsequently participated in the project.

103. Moreover, the Ombudsman wishes to emphasise that the fact that company A may have had *de facto* knowledge which was useful for the preparation of its tender submission as a result of its participation in a similar ongoing project is irrelevant for the purposes of the present inquiry, insofar as any such knowledge does not and cannot exonerate the Commission from its responsibility to prevent any conflict of interest in the execution of the tender procedure in question.

104. Second, in the draft recommendation, the Ombudsman observed that, in view of the fact that a member of the EU Delegation had requested Mr P to participate in the drafting of the Terms of Reference, however limited this participation may have been, the Commission should not have accepted the declarations of lack of conflict of interest made by company A and Mr P without questioning their validity. In its detailed opinion, the Commission did not put forward any arguments to address this issue.

105. Third, the Ombudsman pointed out that the request by the EU Delegation's member was made orally and that there was no written record of this. The Ombudsman notes that, in its detailed opinion, the Commission admitted that this course of action was indeed 'inappropriate and imprudent'.

106. Fourth, in its detailed opinion, the Commission admitted that, even on the assumption that its account of events was accurate, Mr P's involvement would have given rise to an *apparent* conflict of interest, as the Ombudsman observed in the draft recommendation.

107. It thus results from the above that the Commission itself accepted two of the arguments on which the Ombudsman based the finding of maladministration leading to the draft recommendation.

108. In that regard, the Ombudsman welcomes the Commission's commitment to take adequate measures to prevent this type of behaviour from occurring in the EU Delegations in the future. In fact, on 20 March 2013, the Commission provided the Ombudsman with a copy of a letter sent to all EU Delegations concerning the follow-up measures adopted. In particular, the Ombudsman notes that the Commission stressed that EU Delegations should not request potential tenderers to provide written contributions for the Terms of Reference. The drafting of the Terms of Reference is a responsibility which lies exclusively with the Commission.



109. Although the Ombudsman commends the Commission for its efforts to ensure compliance with the principles of good administration in the future, the measures adopted have no effect on its past behaviour in the context of the present inquiry.

110. In view of the foregoing, the Ombudsman concludes that the Commission committed an instance of maladministration in the present case.

B. Claims that the Commission should annul (or terminate) the contract and should compensate the complainant

Arguments presented to the Ombudsman

111. In its complaint, the complainant claimed that the Commission should annul (or terminate) the contract and organise a new tender procedure excluding company A. Moreover, the complainant claimed that the Commission should compensate it for the harm it suffered.

112. However, in its subsequent observations the complainant appeared to acknowledge that, according to the case-law of the General Court, it may not be possible to restart the procedure once a contract has been signed.

113. The Commission did not comment on any of the claims and arguments put forward by the complainant in relation to this matter. However, in view of the fact that the Commission rejected the complainant's allegation, the Ombudsman assumed that it also wished to reject the complainant's claim for the annulment of the contract and its claim for compensation.

The Ombudsman's assessment leading to a draft recommendation

114. The Ombudsman found that the Commission committed an instance of maladministration in the present case.

115. However, the complainant itself noted that the Commission had already concluded the contract with the successful tenderer. The complainant acknowledged that this fact may make it more difficult to repair the harm by re-launching the tender procedure.

116. In the Ombudsman's view, re-launching the tender procedure did not appear to be a realistic option, given the time that had elapsed since the events that gave rise to the present complaint. Thus, the Ombudsman's analysis was focused on the claim that the Commission should award compensation to repair the harm in the present case.

117. In this respect, and as a preliminary matter, the Ombudsman noted that, although the complainant did not appear to have explicitly raised its claim for compensation in its



correspondence with the Commission, this claim should be regarded as admissible insofar as it was a direct consequence of the allegation disputed by the Commission.

118. Moreover, the Commission denied any wrongdoing on its part. In these circumstances, a claim for compensation would clearly have been rejected by the Commission. It would therefore not have been appropriate to require the complainant first to submit its claim to the Commission before raising the issue with the Ombudsman.

119. As regards the substance of the claim for compensation, the Ombudsman noted that the second paragraph of Article 340 of the Treaty on the Functioning of the EU ('TFEU') establishes as follows:

" In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. "

120. Furthermore, in accordance with settled case-law, the EU's non-contractual liability is incurred when three cumulative conditions are satisfied, namely (i) unlawful conduct on the part of the EU institutions (ii) damage and (iii) a causal link between the unlawful conduct and the damage suffered. [14]

121. The EU courts have established that not every infringement of EU law gives rise to liability under the second paragraph of Article 340 TFEU. Indeed, the breach must be sufficiently serious. In this respect, the decisive test is whether the EU institution concerned manifestly and gravely disregarded the limits of its discretion. [15]

122. As regards the concept of damage, it appears from the case-law that this concept covers both material losses and loss of the revenues which would have occurred if the harmful act had not taken place. [16]

123. Moreover, there is a causal link for the purposes of establishing the existence of non-contractual liability where there is a direct causal link between the fault committed by the institution concerned and the harm allegedly suffered, the burden of proof for which rests on the applicant (i.e., the complainant in the present case). [17]

124. More generally, according to well-established case-law, it is for the applicant (i.e., the complainant in the present case) to show that the various conditions relating to non-contractual liability on the part of the EU are met. [18]

125. In the present case, the complainant had not submitted any arguments or evidence to show that the above-mentioned conditions were met. In these circumstances, the Ombudsman was unable to conclude that the Commission should award compensation by virtue of the principle of non-contractual liability for unlawful acts.

126. However, the Ombudsman found that the Commission committed an instance of



maladministration in the present case. As indicated above, it seemed impracticable in the present circumstances for the Commission to correct the maladministration by re-launching the tender procedure. However, the fact remained that the complainant had suffered negative consequences as a result of the maladministration. For instance, it had incurred expenditure in legal advice in order to defend its rights, which would have been avoided if the Commission had properly handled the relevant issue.

127. Besides, it is arguable that the Commission committed a further irregularity by concluding the contract with company A before informing the unsuccessful tenderers of the outcome of the tender, as indicated above (points 26-32).

128. In these circumstances, the Ombudsman considered that the Commission should make an adequate *ex gratia* payment to the complainant in order to try and offset the negative consequences resulting from the maladministration that has occurred. Making such a payment would show, without establishing any precedent, that the institution cares for the complainant and, at the same time, provides a positive response to a specific complaint. This would be beneficial, not only to the person, but also to the institution, insofar as it would improve the latter's relations with citizens.

129. In view of the foregoing, the Ombudsman decided to make the following draft recommendation in accordance with Article 3(6) of the Statute of the Ombudsman:

" The Commission should make an adequate ex gratia payment to the complainant. "

The arguments presented to the Ombudsman after the draft recommendation

130. In its detailed opinion, the Commission refused to make an *ex gratia* payment to the complainant. In its view, such payment would have been appropriate only if the latter had suffered negative consequences resulting from the Commission's behaviour, which, according to the Commission, was not the case.

131. The Commission added that it had considered cancelling the tender procedure when the initial complaint was made. However, it concluded that doing so would have been disproportionate, given Mr P's limited involvement in the drafting of the Terms of Reference and considering the importance of the project for the beneficiary and its relation with an ongoing similar project.

132. In its observations on the Commission's detailed opinion, the complainant expressed its dissatisfaction and pointed out that the Commission admitted that its course of action had been 'inappropriate and imprudent'. Thus, it considered that the Commission needed to do more than merely adopt measures for the future as this would not eliminate the consequences of the Commission's misbehaviour in the present case.



The Ombudsman's assessment after the draft recommendation

133. The Ombudsman notes with regret that the Commission has rejected the draft recommendation. Although the Commission admitted, at least in part, that its approach to the complainant's case did not comply with good administrative practice, it took the view that no compensation was justified in the present case since the complainant had not proven that it had suffered any harm. In so doing, the Commission ignored the Ombudsman's finding that the complainant has indeed suffered negative consequences as a result of the maladministration committed, including in particular, the legal costs it incurred in seeking to protect its rights. The Commission also disregarded the Ombudsman's advice that making an *ex gratia* payment would show, without establishing any precedent, that the institution cares for the complainant and, at the same time, provides a positive response to a specific complaint, something that would be beneficial, not only to the person, but also to the institution, insofar as it would improve the latter's relations with citizens.

134. The Ombudsman finds the Commission's position to be highly regrettable and not in line with principles of good administration. Even though the Ombudsman welcomes the action taken by the Commission to improve its performance in the future, she considers that a critical remark needs to be made in relation to the case at hand.

C. Conclusions

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

It is good administrative practice to avoid actual, potential and apparent conflicts of interest in the context of tender procedures. In the present case, the Commission allowed an expert of the successful tenderer to participate in the drafting of the Terms of Reference, which gave rise to at least an apparent conflict of interest. This constitutes an instance of maladministration.

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

Emily O'Reilly

Done in Strasbourg on 27 January 2014

[1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.



[2] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ 2007 L 335, p. 31.

[3] This document can be found online at <http://ec.europa.eu/europeaid/prag/document.do> [Link]. It should be noted that a new version of this document was adopted in 2012.

[4] 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. As from 1 January 2013, a new Financial Regulation is in force, namely Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002; OJ 2012 L 298, p. 1. However, this decision refers to the old Financial Regulation, which was in force at the relevant time.

[5] This document can be found online at:

<http://www.oecd-ilibrary.org/governance/managing-conflict-of-interest-in-the-public-service/oecd-guidelines-for-managing-conflict-of-interest-in-the-public-service> [Link]

[6] See the Ombudsman's draft recommendation in complaint 642/2008/TS, points 25 and 26.

[7] See the Ombudsman's draft recommendation in complaint 642/2008/TS, point 31.

[8] Case T-89/01 *Willeme v Commission* [2002] ECR SC-I-A-153 and SC-II-803, paragraph 47.

[9] Case T-195/05 *Deloitte Business Advisory v Commission* [2007] ECR II-871, paragraph 67.

[10] Joined cases C-21/03 and C-34/03 *Fabricom v Belgium* [2005] ECR I-1559, paragraphs 33-36.

[11] See Joined cases C-21/03 and C-34/03 *Fabricom v Belgium*, cited above, paragraph 27.

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

[13] Decision of the Ombudsman closing the inquiry into complaint 1341/2008/MHZ against the European Commission, at point 28. This decision is available online at <http://www.ombudsman.europa.eu> [Link]

[14] See, for instance, C-352/98 *Bergaderm v Commission* [2000] ECR I-5291, paragraphs 42-44.



[15] *Ibid* .

[16] See, for instance, Case T-178/98 *Fresh Marine v Commission* [2000] ECR II-3331, paragraphs 105 and following.

[17] See, for instance, Case T-149/96 *Coldiretti v Council and Commission* [1998] ECR II-3841, paragraph 101.

[18] See, for instance, Joined Cases C-162/01 P and 163/01 P *Bouma and Beusmans v Council* [2004] ECR I-4509, paragraph 100.