

Draft recommendation to the European Commission in complaint 1270/2007/(ET)ID

Recommendation

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

(Made in accordance with Article 3 (6) of the Statute of the European Ombudsman (1))

THE COMPLAINT AND ITS BACKGROUND

The complainant participated in a Consortium which submitted an offer for the tender entitled "Support to the Implementation of Reforms in Childcare and Child protection in Armenia" (EuropeAid/123125/C/SER/AM), which was advertised by the Delegation of the European Commission in Armenia and Georgia ("the Delegation").

On 14 November 2006, the complainant received an award letter from the Delegation, notifying it that its offer had been accepted and requesting it to submit, within 15 days, the necessary documentation in order to verify the declarations made in the tender submission form. After receiving the required documents, the Delegation sent the contract to the complainant for signature. The complainant submitted the requested evidence and, on 7 December 2006, it received an acknowledgement of receipt from the Delegation.

However, on 20 December 2006 and without any prior notification, the complainant read a cancellation announcement of the tender in question, which had been placed on EuropeAid's website. According to the announcement there had been irregularities in the procedure that had hampered fair competition.

On 20 December 2006, the complainant wrote to the Delegation, protesting against the above announcement and noting that it had neither been informed of the cancellation of the tender, nor asked for any information or clarification in this regard. It said that the announcement harmed the Consortium's reputation. The complainant wondered why the alleged irregularities were discovered only after the tender award and not during the evaluation procedure.

By faxed letter of 21 December 2006, the Delegation replied by referring to Article 2.4.14 of the Practical Guide to contract procedures for Commission external actions. According to this provision, the procurement procedure may be cancelled by the Contracting Authority, without the tenderers being entitled to claim any compensation, in the event that there have been



irregularities in the procedure and in particular where these irregularities have hampered fair competition. The Commission noted that, in the case at hand, these irregularities appeared only during the preparation of the contract and after it had sent the award letter.

On the same day, that is, 21 December 2006, the complainant sent a fax to the Delegation in which it noted that the cancellation announcement could be interpreted as implying unfair professional behaviour by any of the Consortium's members and could, therefore, damage the Consortium's reputation and business profile. The complainant asked the Commission to clarify: (a) the nature of the alleged irregularities; (b) any potential involvement of a member of the Consortium; and (c) whether there was any proof of this involvement. By further letter of 27 December 2006 (attached to the complaint), the complainant reiterated the above allegations and queries, and also requested the modification of the cancellation announcement on EuropeAid's website, in case the reasons for the cancellation had nothing to do with the Consortium.

In its reply of 29 December 2006, the Delegation stated that it was not authorised to provide the complainant with any further information about the reasons for the cancellation of the call for tenders, noting that the proceedings of the evaluation were confidential. Furthermore, the Delegation questioned the damage to the complainant's business interests, since the cancellation notice did not mention, explicitly or implicitly, any company name or, in particular, that of the complainant.

On 5 January 2007, the complainant wrote to EuropeAid Co-operation Office ("AIDCO"), asking it to examine the case. The complainant stressed that it had not yet received a sufficient explanation for the cancellation of the tender. In this letter the complainant repeated its allegation about damage to its business profile. In this regard, it noted that:

(a) after receiving the award letter, it contacted several entities in order to obtain the documentation required for the signature of the contract and commenced negotiations with the other members of the Consortium and with experts, in order to launch the project; and

(b) the cancellation announcement, containing the expressions "irregularities" and "preventing the fair competition", was still accessible by the public on EuropeAid's Website.

The complainant also contested the argument that the requested information was confidential, within the meaning of Article 2.4.10 of the Practical Guide. It stated that, according to the relevant provisions of the Practical Guide, the procurement procedures remain confidential until the end of the work of the Evaluation Committee (Article 2.8.2) or until the signing of the contract (Article 3.3.10). Since the whole tender procedure had been abandoned, the contracting authority was not bound by the confidentiality rule and, in any case, it should not invoke the confidentiality clauses in order to perpetuate a situation that was damaging to the complainant.

In its reply of 18 January 2007, AIDCO noted that the complainant's request about the nature of the irregularities had to be considered as a request for access to documents under 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 (2) ("Regulation 1049/2001"). The requested information was considered as covered by the exception laid down in Article 4(3), second subparagraph, of this Regulation (3) . Since in the given case there was no overriding public interest in disclosure, access to the requested information should be denied. AIDCO nevertheless informed the complainant of its right to lodge an appeal with the Commission's Secretary-General. AIDCO also reminded the complainant that the award letter had been formally recalled before the tender cancellation took place, although the relevant letter of the Delegation (dated 14 December 2006) was returned to the sender as undelivered mail because of an error in the address of the recipient on the envelope.

On 9 February 2007, the complainant appealed to the Secretary-General of the Commission, presenting the facts of the case and its grievances. In his reply of 8 March 2007, the Secretary-General stated that Regulation 1049/2001 does not apply in this specific case, since no access to documents had been asked for. The complainant had rather requested to be given the concrete reasons for the cancellation of the tender procedure. Accordingly, the Secretary-General forwarded the complainant's "request for clarification" to the competent authority, namely, AIDCO.

On 16 March 2007, AIDCO replied to the complainant, by providing further information on the irregularities found in the tender procedure. It stated that the

" said irregularities concerned a possible infringement of the obligations of confidentiality and impartiality and a possible external influence in the framework of the evaluation procedure which could have undermined the independence of the evaluation; the said irregularities had been detected after the conclusion of the evaluation procedure. "

In its complaint of 3 May 2007 to the Ombudsman, the complainant alleged in essence, that the Commission had failed to provide adequate grounds for its decision to cancel the above tender procedure. The complainant claimed that the Commission should terminate the new tender procedure that it had initiated following the cancellation of the one here concerned and reinstate its decision to award the contract to the complainant. Alternatively, the complainant claimed that it should be awarded fair compensation.

In relation to the above allegation and claims, the Ombudsman took into account, in particular, Article 101 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 (4) ("the Financial Regulation"); the decision of the Court of Justice in Case C-92/00 (paragraphs 45 et seq.); and the Administration's duty to state reasons and its purpose. In light of the above, the Ombudsman found sufficient grounds to open an inquiry into the above allegation and claims and informed the Commission accordingly.

THE INQUIRY



In its opinion, the Commission rejected the complaint. In relation to the complainant's allegation, the Commission concluded that it had communicated to the complainant a sufficient account of the reasons for the cancellation of the tender procedure, taking into account the concurrence of a number of circumstances that justified limiting the provision of factual details to the complainant, in order to protect equally deserving public and private interests. Relatedly, it noted that further details were also provided to the complainant in its opinion on the complaint. As regards the complainant's claims, the Commission remarked in its conclusion that it had acted pursuant to the applicable rules and that there were no grounds to justify the complainant's request for damages.

In its observations, the complainant insisted on its complaint. It claimed that it should receive clear reasons for the cancellation of the tender procedure and reasonable compensation for the damage to its reputation, given that the contract had been awarded to another tenderer and awarding the contract to the complainant no longer seemed to be feasible.

THE OMBUDSMAN'S CONSIDERATIONS LEADING TO HIS DRAFT RECOMMENDATION

1 Allegation that the Commission failed to provide adequate grounds for its decision to cancel the tender procedure in question

1.1 The Ombudsman, first, notes that the principle of equal treatment of tenderers, which is a general principal of community law (5) , implies the existence of an obligation of sufficient transparency. This obligation is designed to enable verification that the requirement of equal and fair treatment of tenderers has been complied with (6) . This obligation is triggered, *inter alia* , in relation to decisions cancelling an award procedure (7) . Accordingly, Article 101 of the Financial Regulation (8) , provides that the decision of the contracting authority to cancel an award procedure, before the contract is signed, " *must be substantiated* ", that is, adequately reasoned (9) , and must " *be brought to the attention of the candidates or tenderers.* " This duty to provide reason, which is also enshrined in Article 253 of the EC Treaty, serves precisely the need to ensure an appropriate level of transparency in the contract-awarding procedure. Such transparency in turn ensures compliance with the requirement for the equal and fair treatment of tenderers (10) . Relatedly, it is settled law that:

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

(b) the requirements to be satisfied by the statement of reasons depend on the circumstances of each case. In particular, the following circumstances are pertinent: the content of the measure in question; the nature of the reasons given; and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (11) .

The above conditions imply that, in cases like the present one, concerning the cancellation of a



tender procedure after the issuance of the relevant award decision, the question whether the statement of reasons for the cancellation meets the requirements of Article 101 of the Financial Regulation must be assessed as follows. That assessment must, in particular, take into account the nature of the reasons given and the need to ensure that a review of the compliance with the requirement for fair treatment of tenderers, especially of the one who was awarded the contract would be possible.

1.2 In the present case, the cancellation announcement of the tender in question in the EuropeAid website simply stated that " *[t]he call for tenders is cancelled on grounds of irregularities in the procedure having prevented fair competition* ". Following the complainant's request for clarification, EuropeAid's letter of 16 March 2007 added the following:

" Said irregularities concerned a possible infringement of the obligations of confidentiality and impartiality and a possible external influence in the framework of the evaluation procedure which could have undermined the independence of the evaluation. Said irregularities have been detected after the conclusion of the evaluation procedure " .

It is evident that the above statements only give vague and rather unclear information about the irregularities invoked by the Commission in order to justify the cancellation at issue. Such information does not enable verification of whether the cancellation was reasonably justified (12) and, hence, of whether the complainant was treated fairly.

1.3 In its opinion on the complaint, the Commission also made the following remarks. Any further relevant details concerning the exact nature of the potential confidentiality breach and potential external influence on the procedure could not have been given without compromising the identity of those involved in the irregularities or those who could have played a role in the establishment of the facts. Provision of this information would thus have undermined the decision- making process of the institution concerning the award of contracts and the strict rules of impartiality and confidentiality that must apply to those procedures. These rules have been notably established in the Practical Guide to contract procedures for EC external actions ("the Practical Guide") (13) . In particular, Section 2.8 of the Practical Guide states that the identity of the evaluators shall be kept confidential, and that the proceedings of the evaluation committee are confidential, subject to the Contracting Authority's policy with respect to access to documents. The applicability of this Guide is also mentioned in the "Instructions to tenderers" that accompany the letter of invitation to tender in a service tendering procedure.

1.4 In relation to the above arguments made by the Commission, the Ombudsman reiterates that the requirements to be satisfied by the statement of reasons for the cancellation at issue depend on the circumstances of the case, including the nature of the reasons given. The Ombudsman does not exclude the possibility that in certain, rather exceptional, circumstances the Commission might rely on duly substantiated grounds of confidentiality/secretcy to support its omission and refusal to give reasons that are more specific in kind than the ones it has provided in the case at hand. However, taking into account the nature of the reasons given by the Commission for the cancellation at issue, its above-mentioned argumentation does not seem to demonstrate the existence of such grounds of confidentiality/secretcy.



1.5 The Commission has invoked two provisions that are contained in Section 2.8 of the Practical Guide (14) . The first one states that " *the identity of the evaluators will be kept confidential.* " The second one states that " *the proceedings of the Evaluation Committee, from the opening of tenders/proposals to the conclusion of the work of the Evaluation Committee, are conducted in camera and are confidential.* " The Ombudsman notes that the Commission has not explained why the latter provision would be relevant to the case at hand. Indeed, the contested cancellation took place after the conclusion of the work of the Evaluation Committee. Moreover, this provision surely should not be interpreted in a way that would favour the non-disclosure of elements involving irregularities in the work of the Evaluation Committee, such as breaches of the applicable rules about impartiality. As regards the first provision, it must be interpreted in a way which is compatible with the principle of transparency referred to above and with the principle of proportionality (15) . This compatibility implies, in particular, that the provision must be interpreted and applied in a manner which is reasonably tailored to serve its legitimate objective. The provision appears to further the Community's legitimate interest in adequately protecting the members of the Evaluation Committee from all external interference and pressures when they perform the sensitive task of evaluation of the tenders, thereby preserving the integrity of the proceedings. However, in the case at hand, it may be inferred from the explanations given in EuropeAid's letter of 16 March 2007, in conjunction with the Commission's arguments presented in point 1.3 above, that the evaluation procedure in question was tainted by (a) external influence and/or (b) the participation of (at least one) evaluator who appeared to have violated the obligations of confidentiality and impartiality (16) . Under these circumstances, even assuming that the provision here discussed is still applicable after the completion of the work of the Evaluation Committee, it is difficult to understand how keeping secret the identity of the evaluator(s) concerned could still further the objective of preserving the integrity of the procedure. In this regard, the Ombudsman notes that the integrity of the procedure was not preserved and that a new tender procedure had to be organised, presumably without the participation of the evaluator(s) concerned.

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

1.7 On the basis of the above, the Ombudsman concludes that the reasons provided by the



Commission for its decision to cancel the tender procedure in question do not appear to be adequate. Hence, this decision is likely to amount to an instance of maladministration. The Ombudsman will, thus, make a relevant draft recommendation (17). For the purposes of the formulation of this recommendation, the Ombudsman will take into account the Commission's statement that the detailed confidential documents that served as basis for the cancellation decision are available to review by the Ombudsman.

2 Claim for compensation

2.1 In his observations on the Commission's opinion, the complainant did not insist on his claim that the new tender procedure should be terminated, since this procedure has been completed and the contract has been awarded to another company. Given these facts, no further inquiry into this claim and the related claim that the initial award decision should be reinstated is justified.

2.2 The complainant's claim for compensation is based on an alleged damage to its "business profile." In this regard, the complainant noted the following in its letter of 5 January 2007 to AIDCO:

" This damage is concrete and continuous as long as no clarifications are given. This is obvious since on receiving the award letter we came into contact with Public Authorities, Banks and other relevant entities to obtain the documentation required for the signature of the contract, as well as with our consortium members and experts in order to plan ahead their mobilisation for the commencement of the project. Now we find ourselves in an embarrassing situation to give them a clear and sufficient explanation for the reasons of the cancellation, which we ignore, in order to disperse any possible suspicion of irregular practices from our part. "

In its opinion, the Commission rejected the above claim, on the basis of a number of arguments.

2.3 In relation to this claim, it suffices to say that, as indicated by the Commission, the complainant (a) has not substantiated the alleged damage; and (b) has not established a sufficient causal link between the alleged damage and the Commission's omission to give further information with respect to the reasons for the cancellation decision. As regards this second element, it is recalled that the Commission's announcement for the cancellation of the tender procedure simply referred to irregularities that hampered fair competition; it did not somehow implicate the complainant in these irregularities. The complainant could not reasonably be expected to give (to any of its partners that might ask for them) explanations for the cancellation other than the ones provided by the Commission. If the Commission did not provide adequate explanations, this could not reasonably be attributed to the complainant. And the mere possibility that somebody might suspect that the complainant was involved in the irregularities found by the Commission does not mean that such a suspicion could be deemed to be reasonably justified, on the basis of the Commission's behaviour concerning the matter. Finally, the mere possibility of irregularities mentioned above does not amount to an actual and certain damage to the complainant's business reputation.

2.4 In light of the above, the complainant's claim cannot be accepted. However, taking into account the argument put forward by the complainant in support of his claim for compensation



(see point 2.2 above), the Commission is invited, in the context of its detailed opinion on the present draft recommendation, clearly to state that the irregularities found in the tender procedure did not involve the complainant, if such a statement would be factually correct.

THE DRAFT RECOMMENDATION

In light of his remarks in point 1 above, the Ombudsman recommends that the Commission should consider providing more specific and adequate grounds for the cancellation of the tender procedure in question. The Ombudsman also invites the Commission to provide him with a copy of the " *detailed confidential documents that served as [the] basis for the [cancellation] decision* " referred to in the Commission's opinion. These documents, if and to the extent that they would still be characterised by the Commission as confidential, will not be disclosed to the complainant or third parties. These confidential documents, after having been analysed by the Ombudsman, will be removed from the file and destroyed.

Moreover the Commission is invited clearly to state that the complainant was not involved/implicated in the irregularities found in the tender procedure, if such a statement would be factually correct.

The complainant will also be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion by 30 September 2008.

Strasbourg, 9 June 2008

P. Nikiforos DIAMANDOUROS

(1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, Official Journal 1994 L 113, p. 15.

(2) OJ 2001 L 145, p. 43.

(3) According to this provision: " *Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision's making process, unless there is an overriding public interest in disclosure* ".

(4) OJ 2002 L 248, p. 1.

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



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

(7) Cf. Case C-92/00 *HI* [2002] ECR I-10745, paragraph 45.

(8) See footnote 4.

(9) Cf. Article 149(1) of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation, OJ 2002 L 357, p. 1. According to this provision, "*[t]he contracting authorities shall as soon as possible inform candidates and tenderers of decisions reached concerning the award of the contract, including the grounds for any decision not to award a contract for which there has been competitive tendering or to recommence the procedure.*"

(10) Cf. Case C-92/00 *HI* [2002] ECR I-10745, paragraph 46.

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

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

(13) See the EuropeAid website

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

(14) The applicability of the Practical Guide in the present case is not in dispute.

(15) The principle of proportionality is not only a basic good administration requirement (Article 6 of the European Code of Good Administrative Behaviour), but is also recognised as a general principle of Community law. See for instance Case C-384/05 *Piek* [2007] ECR I-289, paragraph 34 (and the case-law cited therein).

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

(17) In this context, the Ombudsman also notes that, on 6 May 2008, the complainant informed the Ombudsman's legal officer handling the case that he would not be willing to accept a friendly solution proposal which had been prepared by the Ombudsman's Legal Service as



regards the present inquiry.