

Decision of the European Ombudsman closing the inquiry into complaint 659/2014/JF against the European Commission

Decision

Case 659/2014/JF - Opened on 16/05/2014 - Decision on 20/03/2015 - Institution concerned European Commission (Critical remark) |

The case concerned the replacement of an individual who was meant to perform duties under a service contract with the European Commission. The complainant turned to the European Ombudsman alleging that the Commission had failed to properly explain the reasons for his replacement. The Ombudsman inquired into the matter and found that the Commission had failed to communicate clearly with the consortium that was awarded the service contract. Given that it was no longer possible to find a solution to the instance of maladministration identified, the Ombudsman closed the case with a critical remark. She also stated that she expects the Commission to be more prudent when dealing with similar situations in future.

The background to the complaint

1. The case concerns the complainant's replacement as Deputy Team Leader in the consortium which submitted the winning bid in response to a European Commission request for services.

2. In May 2013, the Commission launched a request for services (hereinafter, the 'request for services'). The complainant was the proposed Deputy Team Leader of the consortium that was awarded the highest score in the Commission's procedure for selecting a service provider.

3. In July 2013, the consortium leader informed the complainant that the consortium was the Commission's " *preferred bidder* ", but that the Commission had requested that the Deputy Team Leader be replaced " *in order to provide assurance of ... in-depth knowledge of EC procedures in the team.* "

4. The complainant, who was irked at being replaced, sought more information from the Commission which replied that

"[a]fter the contract was signed the Consortium headed by [the consortium leader] suggested adjustments, included [sic] expert replacement, to respond to some weakness of the proposal and the EC accepted. The fact does not touch at all your reputation to find other interesting assignments in line with your expertise. "



5. The complainant then complained to the European Ombudsman.

The inquiry

6. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

1) The Commission failed to properly explain the complainant's replacement as Deputy Team Leader in the winning consortium.

2) The Commission should properly explain the complainant's replacement or award him approximately EUR 52 000 by way of compensation.

7. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. The Ombudsman's services also carried out an inspection of the Commission's file concerning this case. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Alleged failure to properly explain the complainant's replacement and related claim

Arguments presented to the Ombudsman

8. In support of his allegation, the complainant argued that, according to the consortium leader, his replacement was a condition for the Commission to award the contract to the consortium.

9. In its opinion, the Commission explained that, on 1 July 2013, it informed the consortium leader that the Selection Committee had awarded the highest score to the consortium. The Commission asked the consortium leader to confirm the availability of the experts proposed in its offer. The consortium leader then contacted the Commission to discuss the specific terms of reference and to receive feedback on its offer. The Commission informed the consortium leader that, according to the report prepared by the Selection Committee, the Deputy Team Leader (that is, the complainant in this case) lacked specific experience in relevant European evaluation methods and techniques in the field of external relations and development cooperation, which was required by the request for services. The complainant's experience related mainly to monitoring and evaluating non-development expenditure in the agriculture and banking sectors, which follow different procedures and approaches.

10. The Commission assured the complainant that neither before nor after the contract was awarded had it requested his replacement. It added that it was unfortunate that the consortium



leader had provided him with imprecise and misleading information. However, the feedback that the Commission had provided "[w] *as for information purposes only and did not purport to have an incidence on the award decision or on the experts proposed.* " According to the Commission, the consortium leader had misinterpreted its feedback.

11. The Commission explained that, on 16 July 2013, it signed the contract with the consortium leader. By letter of the same day, the consortium leader informed the Commission that, due to unforeseen circumstances, the complainant was no longer available to perform his duties under the contract. The consortium leader thus proposed another expert. Since it had no reason to question the consortium leader's statements, and since it was convinced that the replacement would not jeopardise the implementation of the contract, the Commission accepted the proposed replacement [1] .

12. The Commission stated that it has no contractual relationship with the complainant. It does not consider that the conditions necessary for it to incur non-contractual liability vis-à-vis the complainant are satisfied [2] . Consequently, no compensation is due to the complainant.

13. In his observations, the complainant contended that he had never stated that he would be unable to perform his duties under the contract. It was only through the Commission's opinion to the Ombudsman that he learned that the reason for his replacement was his alleged unavailability. The reasons that the Commission had given him for his replacement were inconsistent with those that it provided in reply to the Ombudsman's inquiry.

14. The complainant also took the view that the Commission had an obligation to confirm that the replacement was justified. It was not sufficient for the Commission simply to accept that there were " *unforeseen circumstances* ", without requesting further information. In the context of other EU projects, the Commission requires sound reasons for experts to be replaced. In this case, the Commission did not hear the complainant. Consequently, it failed to ensure that his replacement was justified.

15. The complainant argued that the Commission's feedback to the consortium leader had a negative impact on his situation. He added that, even if the Commission's feedback was not intended to lead to changes in the expert team, the fact remains that the Commission had acted negligently. The Commission should have foreseen that the consortium leader could have interpreted its feedback as an invitation to take action in order to remedy the complainant's lack of experience.

16. According to the complainant, communication between the Commission and bidders during the competitive process up to the signature of the contract is part of a well-regulated procedure. Bidders do not, therefore, regard the Commission's feedback as a simple exchange of views for information purposes. The complainant considered that the Commission failed to exercise sound judgement. It thus treated him unfairly and was liable for damages.

The Ombudsman's assessment



17. The consortium that had proposed the complainant as Deputy Team Leader was awarded the highest score among the bidders. However, despite the comparatively high score, the Commission's Selection Committee expressed some concerns about whether the complainant had *relevant* professional experience.

18. According to the applicable rules, the Contractor is required to perform the Contract to the highest professional standards [3] . It has to ensure that any member of staff performing the Contract has the professional qualifications and the experience required for the execution of the tasks assigned to him [4] . In the event that the expertise of a member of the Contractor's staff fails to correspond to the profile required by the Contract, the Contractor has to replace that member of staff without delay. The Commission may request the replacement of any such member of staff, stating its reasons for doing so. Replacement staff must have the necessary qualifications and be capable of performing the Contract [5] . In other words, staff members who do not have the required expertise should be replaced, and the Commission has the right to request such replacement.

19. The Commission conveyed to the consortium leader the concerns voiced by the Selection Committee about the complainant's experience. The consortium leader then informed the complainant that, when it decided to replace him, it was " *responding to what [it] saw as an instruction ... to make a change to the team* " (emphasis added). The Ombudsman has not been provided with any evidence to suggest that the Commission **explicitly** asked the consortium leader to replace the complainant. It is nevertheless clear that the way in which the Selection Committee's concerns were conveyed was not apt to reassure the consortium leader that, as the Commission argues, these concerns would not have any " *incidence on the award decision or on the experts proposed* ". This is evidenced by the fact that in its correspondence with the complainant, the Commission stated that the reason for the consortium leader's decision to replace him was " *to respond to some weakness of the proposal* " that the Commission had identified. The Ombudsman considers that the consortium leader reasonably understood that the Commission was asking it to replace the complainant so as not to compromise the award of the contract and that the Commission was aware of this fact.

20. In a situation such as that under consideration, the Commission is clearly the stronger party. The selected bidder, with whom a contract has not yet been signed, is obviously anxious to live up to the demands of the Commission in order to be certain of securing the contract. In such a situation, principles of good administration require the Commission to take particular care to express itself clearly and unambiguously.

21. In this case, if it was not the Commission's intention to have the complainant replaced, the Ombudsman considers that in order to avoid any misunderstandings with respect to the feedback it provided, the Commission should have either explicitly stated that it was not asking the consortium to replace the complainant, or assured the consortium leader that the Selection Committee's concerns would not have any impact on the award decision. By neglecting to do so, the Commission failed to communicate with the consortium leader with the requisite clarity. This constituted an instance of maladministration.



22. As far as possible, the Ombudsman tries to find a solution to the instances of maladministration she identifies. In this case, the complainant has already been replaced as Deputy Team Leader. In addition, the concerns put forward by the Selection Committee indicate that his replacement was not an arbitrary decision. The fact that the complainant was considered to lack specific relevant experience for the purpose of the services to be provided does not necessarily imply that his replacement prejudiced his reputation and/or compromised further business opportunities. The complainant has not provided any evidence to suggest any prejudice of that kind. In light of the foregoing, the Ombudsman is of the view that the complainant's claim for compensation cannot succeed and that a solution for the specific instance of maladministration that occurred in this case is no longer possible. The Ombudsman, therefore, closes the case with a critical remark to the Commission and expects it to be more prudent when dealing with similar situations in future.

Conclusion

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

The Commission failed to communicate with the consortium leader with the requisite clarity.

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

Emily O'Reilly

Strasbourg, 20/03/2015

[1] The Commission referred to Article II.1.7 of the General Conditions of the Framework Contract: "[r] eplacement staff must have the necessary qualifications and be capable of performing the Contract under the same contractual conditions. "

[2] See, for example, the Judgment of the General Court (Third Chamber) of 16 December 2010 in Case T-19/07, *Systran SA and Systran Luxembourg SA v European Commission* , ECR [2010] II-6083, paragraph 126: "[f] or the Community to incur non-contractual liability within the meaning of the second paragraph of Article 288 EC, a series of conditions must be met, namely, the conduct of which the institutions are accused must have been unlawful, the damage must be real and a causal connection must exist between that conduct and the damage in question..."

[3] Article II.1.1 of the General Conditions of the Framework Contract.



[4] Article II.1.4 of the General Conditions of the Framework Contract.

[5] Article II.1.7 of the General Conditions of the Framework Contract.