Decision of the European Ombudsman closing the inquiry into complaint 2400/2012/ANA against the European Commission

Decision
Case 2400/2012/ANA - **Opened on** 08/01/2013 - **Recommendation on** 17/06/2014 - **Decision on** 29/06/2015 - **Institution concerned** European Commission (Critical remark) |

The case concerned *a tender procedure of the European Commission for the provision of IT management and related services. The complainant is a consortium whose bid for the contract in question was unsuccessful.*

The complainant's main contention is that the Commission awarded the contract to a tenderer who offered a solution for the recovery of data in the event of a disaster which was inferior to what was required by the contract.

The European Ombudsman inquired into the issue and found that, by considering that the winning tender was in conformity with the tendering specifications, the Commission committed maladministration in this case. She recommended to the Commission that it (a) acknowledge its maladministration, and (b) address the complainant's claim for compensation.

Regrettably, the Commission did not accept the Ombudsman's recommendations, and failed to provide convincing reasons for its refusal. Therefore, the Ombudsman closed the case by addressing two critical remarks to the Commission.

The background

1. This case concerned a tender procedure of the European Commission for the provision of IT management and related services that was launched in 2010. The complainant is a consortium whose bid for the contract in question was unsuccessful.

2. Following a request from the complainant, the Commission provided additional information to it about the tender, including information about the winning tenderer. On the basis of this information, the complainant found out that the Disaster Recovery Site ('DRS') proposed by the winning tenderer was not a Tier-4 solution [1] as required by the tender. The complainant wrote to the Commission and argued that, firstly, Section 9.2.21 of Annex II.A.2 of the Tender

Specifications provides: " *A disaster recovery site (Tier4 level) should be provided at least 100 km away from Luxembourg (Kirchberg) to ensure a total availability in case of disaster to complement the Main and Backup data centre* " and, secondly, in its replies to questions by tenderers, the Commission explained that " *the disaster recovery site must be Tier level 4* " [2] .

3. In its reply, the Commission confirmed that the tendering specifications and the answers to the questions mention a Tier-4 DRS. It maintained, however, that, although the winning tenderer proposed to provide a Tier-3 DRS, " *this element cannot itself automatically involve the exclusion of its bid as it does not constitute either an exclusion criterion or a selection criterion* ". The Commission said that the Evaluation Committee took this element into account, gave a negative evaluation and, thus, awarded the winning tenderer fewer points. The Evaluation Committee concluded that this element did not result in a lack of conformity with the tendering specifications and stated that " *the advantages however outweigh the weak points* ".

4. Dissatisfied with the Commission's reply, on 4 December 2012, the complainant lodged this complaint with the European Ombudsman [3] .

5. On 8 January 2013, the Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

1) In carrying out the evaluation of the offers submitted in response to the invitation to tender concerned, the Commission infringed the relevant rules and principles.

2) The Commission should compensate the complainant for all the damages sustained including, but not limited to, the tender participation expenses (EUR 1 500 000) and loss of profit.

Allegation that, in carrying out the evaluation of the offers submitted in response to the invitation to tender concerned, the Commission infringed the relevant rules and principles

The Ombudsman's draft recommendations

6. In making draft recommendations to the Commission, the Ombudsman took into account the arguments and opinions put forward by the parties. The issue of the Tier-4 DRS requirement in the tender documents held a central place both in the submissions of the parties and in the Ombudsman's analysis.

7. Specifically, in its opinion, the Commission provided a detailed account of the background to the complaint and of the steps leading to the selection of the winning tenderer. In particular, the Commission informed the Ombudsman that the Evaluation Committee proceeded to both a technical evaluation and a financial evaluation. The Commission said that although, technically,

the complainant's was the best offer, the winning tenderer gave the cheapest offer. Based on the formula used, the winning tenderer offered the best value for money and was awarded the contract.

8. Regarding the complainant's key argument that the Tendering Specifications, as well as the answers to the tenderers' questions, made it clear that a Tier-4 level DRS was needed, the Commission acknowledged that this indeed was the case. However, the Commission argued that this requirement was evaluated as one of the 33 'elements' listed under the award criterion " *Fitness of the proposed organisation, methods, processes and services to sustain operational excellence* " in the technical evaluation. The Commission observed that the Evaluation Committee " *took this formal aspect into consideration by giving the winning tenderer a negative evaluation for this element and, thus, fewer points* ". Specifically, the evaluation report states: " *The proposed disaster recovery site is only Tier-3 compliant whereas Tier-4 was requested in the Technical Annex* ". However, that report concludes: " *The tenderer's vision regarding this criterion is truly innovating and brings interesting solutions while ensuring operational excellence. The advantages however outweigh the weak points* ". The Commission argued that, based on the Financial Regulation, it could not reject the winning tender since it complied with the tendering specifications.

9. In light of the above, the Commission argued that its evaluation, ranking and final selection complied with the relevant applicable rules, with the principles of proportionality, equal treatment and transparency, and with the principles of good administration. Therefore, the Commission considered that the complainant's claim for compensation for the expenses incurred in preparing its tender and for loss of profit was not justified.

10. In its observations, the complainant disputed the Commission's arguments and contended that the Commission failed to ensure equal treatment among potential tenderers and thus distorted competition.

11. In her analysis, the Ombudsman focused on the question of whether the Commission committed a manifest error of assessment in considering that the winning tender was in conformity with the tendering specifications despite the fact that it proposed a Tier-3 DRS solution when a Tier-4 one was required [4] .

12. The Ombudsman considered that it was clear from the tender file that the Commission asked for a specific solution and confirmed, in reply to several questions, that the alternative it finally accepted was not acceptable. It was thus clear that the Commission accepted an offer that did not correspond to what it had asked for. It was also clear that the Tier-4 DRS requirement, as the complainant argued, could have had the effect of dissuading potential bidders from taking part in the tender procedure concerned. This was decisive and the Ombudsman reached the conclusion that the Commission had made a mistake. Consequently, the Ombudsman found that, in considering that the winning tender was in conformity with the tendering specifications, the Commission made a manifest error of assessment under the relevant rules which constituted an instance of maladministration.

13. Having found that the Commission had committed maladministration, the Ombudsman recommended that, in order to remedy this error, the Commission should acknowledge the maladministration and address the complainant's claim for compensation.

14. Accordingly, the Ombudsman made the following draft recommendations to the Commission:

" *The Commission should acknowledge that, by considering that the winning tender was in conformity with the tendering specifications, it committed maladministration.*

The Commission should address the complainant's claim for compensation ."

15. In its detailed opinion on the Ombudsman's draft recommendations, the Commission stated that it understood them to mean that, by decreasing the marks given to the winning tender that did not offer a Tier-4 DRS instead of rejecting it altogether, the Commission made a manifest error of assessment. In the Commission's view, this amounts to determining that the requirement of a Tier-4 DRS was an essential requirement that could lead to the elimination of the winning tenderer in line with the Rules of Application ('RAP') of the Financial Regulation [5] .

16. The Commission argued, however, that the Tier-4 DRS was not an essential requirement. It referred to the wording of the specific clause in the Tendering Specifications [6] as well as to other parts of the Tendering Specifications [7] , which provided detailed information on the substantive requirements for the DRS included in the tender, as well as to its general approach regarding data centres [8] , in order to argue that the need for a Tier-4 DRS was not of such a degree as to render it an essential requirement.

17. Moreover, the Commission drew a distinction between the 'building and infrastructure standard' ranging from Tier-1 to Tier-4 and the 'disaster recovery methods', ranging from Tier-1 to Tier-7. It argued that Section 3.2 of the reference [R17] document obviously referred to the latter [9] . On the contrary, however, Section 9.2.21 of Annex II.A.2 of the Tendering Specifications referred to Tier-4 building and infrastructure in a very brief manner (" *a DRS (Tier4 level)" - into brackets - "should be provided ...* ") since it was not an essential requirement. The Commission argued that the characteristics of the building hosting the DRS were of secondary importance given that the primary objective was to ensure that a disaster would not disrupt the business continuity or, in other words, that efficient methods or services were available to recover the data swiftly, should a disaster occur. In a nutshell, the Commission submitted that, while the tendering specifications required a Tier-4 or a Tier-5 Disaster Recovery method as an essential element, they did not require the Tier-4 building and infrastructure standard " *with the same strength"* .

18. Regarding the questions asked by tenderers in relation to the Tier-4 DRS requirement, the Commission stated, concerning question no. 66 asking the Commission to " *elaborate on the Tier 4 requirement as specified in [Section] 9.2.21* ", that, by referring to the reference [R17] document, its answer unambiguously concerned the 7-Tier standard related to the disaster recovery methods. The Commission nevertheless recognised that the answers to questions

110, 158 and 160 could have been clearer in order to better reflect the Commission's primary need to be able to quickly recover its data in the event of a major incident. However, in the Commission's view, that could not transform the Commission's evaluation into a manifest error of assessment.

19. The Commission further insisted that, as a professional in this field, the complainant was aware that the call for tenders laid stress on the classification related to the disaster recovery methods rather than on the classification related to the building and infrastructure. In this regard, the Commission argued that the winning tenderer " *was fully compliant with this expressed requirement of level 4 or 5 in the 7 tiers model* ". The Commission reiterated that the Evaluation Committee observed that the winning tenderer proposed a DRS which " *is only Tier-3 compliant whereas Tier-4 was requested in the technical annex* " and that this comment, however, referred to the 4 Tiers of building and infrastructure. As this requirement was not essential, the Evaluation Committee considered this to be an area of lower technical quality and, hence, the winning tender scored lower marks than the complainant's tender for this element.

20. The Commission also argued that it " *would have been contrary to the rules applicable to the tender procedure and out of any proportion to consider the winning tender as a variant and to reject it as the Tier-4 requirement for the building and infrastructure of the DRS is non-essential for this contract* ". The Commission added that it could not reject the winning tender as " *it fully complied with the tendering specifications. This would have also been manifestly a violation of the principles of proportionality and equal treatment and contrary to the principles of economy and of sound financial management, and to the whole of the rules governing this call for tenders* ".

21. The Commission stated that the complainant's tender was technically the best offer, whereas the winning tenderer scored second best, so the evaluation of the DRS requirement did not affect the technical evaluation. From a financial perspective, the Commission submitted that the DRS represents between 2.8% and 4.25% of the total contract value. However, the value of the complainant's offer was 24.68% (or EUR 30.6 million) higher than the winning tender and, therefore, the DRS cost does not change the financial evaluation of this procurement procedure in any way.

22. As regards the Ombudsman's finding about the dissuasive effect that the Tier-4 DRS requirement might have had for potential bidders, the Commission argued that it exercised due care and did all it could to maximise competition for this contract. This was evidenced by the fact that it never received more offers in response to other calls for tenders concerning IT operational activities. The Commission rejected the complainant's argument that the Tier-4 requirement caused several companies not to participate because such a site " *is not available within the geographical scope of Belgium* " on the grounds that (a) it received a large number of offers, (b) there was no indication regarding the location of the DRS in the tendering specifications, and (c) it was possible to subcontract the DRS to any one of the many specialised suppliers in the EU. Consequently, the Commission argued that the requirement in question could not have a dissuasive effect for potential bidders. Nor could it be considered to

distort competition.

23. In conclusion, the Commission took the view that the winning tender complies with the essential requirements laid down in the Tendering Specifications. It argued that there is no manifest error of assessment and, therefore, no maladministration. The Commission thus considered the complainant's request for compensation unfounded and disproportionate in view of the circumstances of this complaint and disagreed with the Ombudsman's proposal to address it.

24. In its observations, the complainant argued that the CJEU's case-law is clear: the technical specifications should be clearly indicated, so that all tenderers know what the conditions established by the contracting authority cover. Moreover, the principle of transparency implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the tender documents so that, firstly, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract [10] .

25. The complainant added that, by inserting the Tier-4 DRS requirement in the Tendering Specifications and confirming the need for such a requirement to be fulfilled in its answers, the Commission established a mandatory requirement which it now argues was non-essential. However, both in the Tendering Specifications and its answers, the Commission used such wording as " *should be provided* ", " *is needed* ", " *must be* ", which supports the view that the requirement was presented as mandatory. In the complainant's view, the Evaluation Committee should thus have rejected the winning tender and not merely awarded it lower marks.

26. Furthermore, as regards the Commission's argument that the Tier-4 DRS requirement is referred to in a very brief manner and that this reaffirms its non-essential nature, the complainant stated that it does not see how the brevity of the statement could indicate the non-mandatory character of the requirement. Clear, precise and unambiguous wording - especially an exact figure - cannot be subject to any different or further interpretation or justification. The complainant contended that a Tier-4 requirement is and remains a Tier-4 requirement and not a Tier-l, -2 or -3 requirement.

27. Next, the complainant disputed the validity of the Commission's distinction between the 'building and infrastructure standard' and the 'disaster recovery method'. In the complainant's view, the winning tenderer offered a Tier-3 building and even though the Commission states that the winning tenderer was fully compliant with the minimum Tier-4 disaster recovery method requirement, it did not demonstrate how the winning tenderer achieved such compliance by proposing only a Tier-3 level building.

28. Regarding the secondary importance the Commission assigned to the building infrastructure compared to business continuity, the complainant relied on the Court's pronouncements in *Commission v Netherlands* [11] to the effect that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal

manner. Taking into account that the Commission conceded that the answers to questions 110, 158 and 160 could have been clearer, it follows, in the complainant's view, that the tenderers exercising ordinary care could not understand the exact significance of the Tendering Specifications and interpret them in the same way.

29. Next, the complainant disagreed with the Commission's reasoning that, as a professional in this field, the complainant should know that the Commission laid stress on the classification related to the disaster recovery method, rather than on the classification related to the building and infrastructure. In its view, the general transparency rule obliges the contracting authority to draft the Tendering Specifications in such a way that they are understood in the same way by all tenderers and without having resort to subjective interpretations. To remove any doubt, the Commission unambiguously confirmed in its answers to tenderers' questions that the disaster recovery site " *must be Tier level 4* ".

30. Concerning the Commission's argument that it exercised due care and did all it could to maximise competition for this contract, the complainant argued that it found no argument that would address the allegation concerning the possibility that other potential tenderers refrained from participating in the tendering procedure.

31. Finally, the complainant argued that according to the Vade Mecum [12] on Public Procurement in the European Commission, tenders have to be rejected at the evaluation stage if they propose a solution different from the one envisaged.

The Ombudsman's assessment after the draft recommendations

First draft recommendation

32. The Commission refused to acknowledge that, by considering that the winning tender was in conformity with the tendering specifications, it committed maladministration. The Commission understood the Ombudsman's finding of maladministration to mean that, because the winning tender did not comply with the Tier-4 DRS requirement, it ought to have rejected it. In the Commission’s view, however, in order for it to be able to reject the winning tender, the Tier-4 DRS would have had to be an 'essential requirement' within the meaning of the rules implementing the Financial Regulation. Consequently, the Commission concentrated its efforts on trying to prove that the Tier-4 DRS requirement was not essential.

33. The Ombudsman considers that the Commission's approach to analysing the case and defending its position is not convincing.

34. It is clear from a cursory reading of the analysis leading to her draft recommendation that the Ombudsman made two key findings: (a) the Ombudsman emphasised that the Commission accepted an offer for something different from what it had asked for; (b) the Ombudsman found

that the Tier-4 DRS standard required by the call for tenders but, eventually, not from the winning tenderer, could have had the effect of dissuading potential bidders.

35. Before analysing the Commission's arguments in relation to her findings, the Ombudsman considers it useful to summarise the Court of Justice of the EU's consistent case-law according to which, (1) the contracting authority is required to ensure at each stage of a tendering procedure that the principle of equal treatment and, thereby, equality of opportunity for all the tenderers is observed [13] , and(2) under that principle, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions [14] .

36. Moreover, according to the same case-law, the principle of transparency, which is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority, implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tendering specifications [15] . Importantly, the principle of transparency therefore implies that all technical information relevant for the purpose of a sound understanding of the contract notice or the tendering specifications must be made available as soon as possible to all the undertakings taking part in a public procurement procedure in order, firstly, to enable all reasonably well-informed and normally diligent tenderers to understand their precise scope and to interpret them in the same manner and, secondly, to enable the contracting authority actually to verify whether the tenderers' bids meet the criteria of the contract in question [16] .

37. Mindful of the above, the Ombudsman considers it necessary to examine the Commission's main arguments, in relation to finding (a), that (i) the Tier-4 DRS requirement was not an essential one, and that (ii) it did not have the meaning the Ombudsman ascribed to it.

38. As regards point (i), it must be noted that whether a requirement in a call for tenders is essential or not must be clearly stated in the tender documents. Even if the Commission had initially made it clear that the Tier-4 DRS requirement was not essential - which it did not -, at least one of its replies to tenderers' questions (" *must be Tier4* ") can only be understood to mean that this was a condition that had to be fulfilled [17] .

39. As regards point (ii), the Commission's distinction - invoked for the first time at this stage of the inquiry - between the *'building and infrastructure standard'* and the *'disaster recovery method'* , does not bear out its case; if anything, it merely confirms the Ombudsman's finding that the Commission failed to make it clear to tenderers what the Tier-4 DRS requirement actually meant [18] . In any event, whatever the scale according to which compliance with the Tier-4 requirement is to be measured, the Evaluation Committee's report made it clear (" *the proposed DRS is Tier-3 compliant* ") that the winning tender did not meet that requirement.

40. It follows that the Commission failed to set out the conditions with sufficient clarity in this case. Moreover, the Commission has not submitted sufficiently convincing arguments or

evidence in support of its contention that the winning tender complied with all the Tendering Specifications. The Ombudsman therefore maintains her finding that, by accepting a tender that did not comply with the Tier-4 DRS requirement, the Commission made a manifest error of assessment.

41. In relation to finding (b), the Commission's argument that there was an increase in the number of tenders received does not, in itself, establish that potential tenderers were not discouraged from making an offer. It is clear that the Tendering Specifications contained a Tier-4 DRS requirement, upon which the economic operators concerned legitimately relied when deciding to submit a tender or, on the other hand, not to participate in the procurement procedure concerned [19] . It follows that the Commission's arguments that potential tenderers could not have been dissuaded by the Tier-4 DRS requirement and, as a result, competition could not have been distorted, are not established.

42. In light of the above considerations, the Ombudsman finds that the Commission acted wrongly when it failed to accept this draft recommendation.

Second draft recommendation

43. In the interest of fairness and in light of the particular circumstances of the case, the Ombudsman recommended that the Commission should address the complainant's claim for compensation for the tender participation expenses and loss of profit. This recommendation took account of the fact that, had the Commission made it clear that a Tier-3 DRS could be acceptable, the complainant could have submitted a different (and possibly successful) tender. More importantly, this recommendation reflected the fact that in evaluating the tenders the Commission, to the detriment of the complainant, departed from its own clearly stated tender requirements. Given that the Commission refused to accept her first recommendation, it did not accept her second recommendation either.

Concluding remarks

44. The Ombudsman regrets that, in its detailed opinion, the Commission did not accept her recommendations and failed to provide convincing reasons for doing so. In fact, the Commission's reasons for rejecting the Ombudsman's recommendations are weak. Its position relies on a rejection of the plain meaning of its own words in its Tender Specifications document and also in its replies to tenderers' questions. The Ombudsman closes the inquiry with two critical remarks. Because of the amounts of public money spent in the contract at issue, the Ombudsman will send a copy of this decision to the Presidents of the European Parliament and of the European Court of Auditors, for information.

Conclusion

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

Good administration requires contracting authorities to ensure that tenders submitted in public procurement procedures financed by the Union budget will be accepted and evaluated only where they comply with all the award criteria laid down in the tendering specifications. In this case, by considering that the winning tender was in conformity with the tendering specifications, although it offered a different solution from that specified, the Commission failed to meet this requirement. This constituted maladministration.

It is a requirement of good administration that an institution makes good any loss incurred by any person as a result of the actions of that institution. In this case, the Commission has refused to examine and subsequently make good the losses incurred by the complainant consequent on the Commission's failure to abide by the specifications set out in its tender procedure. This also constituted maladministration.

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

Emily O'Reilly Strasbourg, 29/06/2015

[1] The seven tiers of disaster recovery for computer systems describe the various methods of recovering mission-critical computer systems as required to support business continuity. With a Tier-4 DRS, it is easier to make such point-in-time (PiT) copies although several hours of data may still be lost. For basic information, see http://en.wikipedia.org/wiki/Seven_tiers_of_disaster_recovery [Link]

[2] For instance, " *Question no. 160: According to your answers to the Questions 66 and 110, we conclude that ... the Data Centres in Belgium can only offer a Tier 3 + solution. Could you confirm your decision or is a Tier 3+ data centre an acceptable solution?*

Reply: We confirm that, as per section 9.2.21 of the Technical Specifications ... the Disaster recovery site must be Tier level 4, irrespective of the location of the data centre ."

[3] For further information on the background to the complaint, the parties' arguments and the Ombudsman's inquiry, please refer to the full text of the Ombudsman's draft recommendations available at: http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/54554/html.bookmark [Link]

[4] Section 9.2.21 of Annex II.A.2 of the Tendering Specifications.

[5] Article 158(3) of the RAP provides: " *Requests to participate and tenders which do not satisfy all the essential requirements set out in the tender documents shall be eliminated* ". See, Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union OJ 2012 L 362, p. 1.

[6] Section 9.2.21 of Annex II.A.2 (Annex 1) of the Tendering Specifications provides: " *a DRS (Tier4 level)" ... "should be provided ...* "

[7] Section 5.2.5 of Annex II.A.2 (Annex 12) of the Tendering Specifications.

[8] Reference [R17] document (Annex 3) - " *Data Centre Consolidation – Approach and State of Play* ".

[9] The Commission submitted that Section 3.2 of the reference [R17] document reads as follows: " *For disaster recovery to a third site, TAXUD will use tape-less back-up using Virtual Tape Library (VTL) technology. Using asynchronous replication technologies, the VTL's will be replicated over long distances between the production and DR sites. TAXUD will opt for point-in-time recovery (Tier 4 Disaster Recovery) or transaction integrity recovery (Tier 5 Disaster Recovery) depending on the applications used* ".

[10] Case C-368/10 *Commission v Netherlands* , ECLI:EU:C:2012:284.

[11] Case C-368/10 *Commission v Netherlands* , cited in footnote 10 above.

[12] The Commission's internal handbook on public procurement procedures.

[13] Case T-165/12 *European Dynamics and Evropaïki Dynamiki v European Commission* ECLI:EU:T:2013:646, paragraph 45; Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 108; Case T-160/03 *AFCon Management Consultants and Others v Commission* [2005] ECR II-981, paragraph 75.

[14] Case T-165/12 *European Dynamics* , cited in footnote 12 above, paragraph 45; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 34.

[15] Case C-368/10 *Commission v Netherlands* , cited in footnote 10 above, paragraph 109; Case T-165/12 *European Dynamics* , cited in footnote 12 above, paragraph 48; Case C-496/99 *CAS Succhi di Frutta* , cited in footnote 12 above, paragraph 111.

[16] Case T-165/12 *European Dynamics* , cited in footnote 12 above, paragraph 48; Case T-50/05 *Evropa ïki Dynamiki v Commission* [2010] ECR II-1071, paragraph 59.

[17] " *In this connection, the objection raised by the Netherlands that the 'EKO' and 'Max Havelaar' labels were not mandatory requirements in respect of the 'ingredients' to be supplied,*

but merely non-binding 'preferences' of the contracting authority which were rewarded by a negligible number of points, must be rejected. On the one hand, just a few points can in some circumstances make the difference between success and failure in an award procedure with a points-based evaluation system, and, on the other, all award criteria - including those to which the contracting authority attaches little importance - must comply, without any reservation, with the fundamental procurement law principles of equal treatment and non-discrimination .... " Case C-368/10 *Commission v Netherlands* , Opinion of the Advocate General, paragraph 123, ECLI:EU:C:2011:840.

[18] In fact, while the Commission argued that the requirement concerned building infrastructure only , in its reply to question no. 66, the Commission stated that the DRS requirement " *unambiguously* " concerned the 7-Tier disaster recovery method.

[19] Case C-368/10 *Commission v Netherlands* , cited in footnote 10 above, paragraph 55.See also paragraph 144 of the Opinion of the Advocate General, cited in footnote 16 above.