

Decision in case 1270/2013/JAS on the European Commission's handling of a grant award procedure.

Decision

Case 1270/2013/JAS - Opened on 19/08/2013 - Decision on 24/05/2016 - Institution concerned European Commission (Critical remark) |

The European Commission funds research programmes in Europe through Framework Programmes for Research and Technological Development. This complaint concerns alleged irregularities in the evaluation of a proposal submitted by a consortium seeking such funding under the programme's energy section.

In February 2013, the Commission informed the complainant that its project proposal was rejected. The complainant then submitted a request for redress to the Commission. As it was unhappy with the results of that redress procedure, it complained to the Ombudsman that the Commission had erred in the evaluation of its proposal. It complained also that a Commission official, in a public forum, had disclosed the results of the selection procedure two weeks before the official results were notified. During the inquiry, the complainant argued that one of the independent expert evaluators had a conflict of interest.

The Ombudsman found no maladministration regarding the evaluation of the complainant's proposal. However, the Ombudsman found that the Commission's premature disclosure of the results of the selection procedure amounted to maladministration.

Furthermore, the Ombudsman found that the Commission failed to manage and address an appearance of a conflict of interest in the case of one of its expert evaluators. This failure amounted to maladministration. With a view to improving the Commission's procedures, the Ombudsman remarked that the Commission should ensure that it acquires, at the outset, all necessary information concerning relevant interests and that it should address any appearances of a conflict of interest which arise.

The background to the complaint

1. In 2012, the complainant (a consortium of organisations from various Member States and third countries) submitted a project proposal in response to a Commission call in the context of the 7th Framework Programme for Research and Technological Development's energy section.



In February 2013, the Commission rejected the proposal. The complainant then submitted a request for redress to the Commission. The Commission acknowledged receipt of the complainant's request and stated that it would deal with the request by 30 June 2013.

2. On 1 July 2013, the complainant complained to the Ombudsman concerning the evaluation of its proposal and the Commission's failure to deal with its request for redress in due time.

The inquiry

3. The Ombudsman opened an inquiry into the complaint and identified the following allegations and claim:

Allegations:

- 1) The Commission erred in the evaluation of the complainant's proposal;
- 2) The Commission discriminated against certain applicants;
- 3) The Commission failed to meet the deadline set for the redress procedure.

Claim:

The Commission should halt contract negotiations (with the winning proposal) until a proper redress procedure is carried out to remedy the alleged irregularities during the evaluation process.

4. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the observations of the complainant in response to the Commission's opinion [1]. In November 2014, during the inquiry, the complainant informed the Ombudsman of a possible conflict of interest situation involving one of the experts who had evaluated the proposals for the Commission. The Ombudsman decided to deal with this new allegation also. The Ombudsman therefore requested an additional opinion from the Commission regarding the alleged conflict of interest. She sent this opinion to the complainant, who then submitted observations thereon. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Allegation that the Commission erred in the evaluation of the complainant's proposal

Arguments presented to the Ombudsman

5. The complainant alleged that the evaluation committee appointed by the Commission wrongly



downgraded its proposal. It noted that the evaluation committee had held that the complainant had not obtained written commitments from third parties aimed at allowing the consortium to use the third parties' infrastructure assets on the project. However, the complainant stated, the call specifications did not request applicants to submit such written commitments from third parties. As a result, the evaluation committee should not have deducted points for this supposed 'omission'.

6. In its opinion, the Commission noted that the complainant's proposal was awarded a very high score of 4.5 points out of 5 under the criterion 2 ("Implementation criterion"). Regarding the issue of the supposed lack of commitments by non-project partners, the Commission noted that the evaluators stated that:

"The 'free' participation of several industrial partners is a significant asset to the project but the value of their contributions appears to be exaggerated in some cases and written confirmation of the commitment from non-project partners was not evident in the proposal."

7. The Commission explained that the above comment was added as a "recommendation for negotiation". It noted that the complainant's proposal was above the minimum threshold. This meant that if the Commission had opened negotiations with the complainant, it would most likely have required the complainant to obtain the partners' commitments in writing. Therefore, contrary to the complainant's assertion that its proposal was downgraded in this regard, the evaluators considered the inclusion of the industrial partners as a very positive aspect.

8. The Commission stated that the fact that the evaluation did not identify any significant weaknesses in the complainant's proposal does not mean that the maximum mark should have been awarded. In addition, the score of 4.5 out of 5 points is a very high mark. It noted that of the 127 proposals evaluated, only 12 were awarded a score of 5.

9. The Commission therefore considered that there was no manifest error of assessment in the scientific evaluation of the complainant's proposal.

10. Regarding the Ombudsman's question of whether it would have altered the score of the complainant's proposal if the commitments from non-project partners had been requested and provided, the Commission noted that it was the applicants' responsibility to include all information in the proposal that they deem to be relevant for the evaluation and to justify the claims made therein. Applicants were free to include, for example, letters of intent from supporters outside the proposing consortium. This was clearly explained in the Guide to Applicants.

11. However, once the deadline for submitting proposals expired, the Commission could not accept additional information, corrections or re-submissions. This was also specified in the rules, which provided, in line with the principle of equal treatment, that the Commission may not invite applicants to supplement or improve the quality of a proposal under evaluation. Finally, it added, applicants have significant freedom to put together a proposal for a project addressing the scientific challenges of the particular research area. The call did not require the submission



of a proposal that included "free participation" of industrial partners. As it was neither an eligibility issue nor related to a choice of topics, it would not have altered the score obtained by the complainant even if the commitments from non-project partners had been sought and obtained.

12. As to the Ombudsman's question of whether a higher score for the complainant's proposal on criterion 2 would have altered the outcome of the competition, the Commission noted that if the complainant's proposal had been awarded a score of 5 for criterion 2, its overall score would have been 14 points. This would have resulted in a tie with the winning proposal. In such cases, the relevant rules [2] provide for the following ranking mechanism to determine which proposal would win: (i) the proposal with the highest score for the 'Impact' criterion would be deemed the winner; (ii) if there was a tie on the 'Impact' criterion, the proposal with the highest score for the 'Scientific and/or Technological Excellence' criterion would be deemed the winner; and then (iii) the overall Work Programme coverage would be taken into account. The complainant's proposal received a score of 4.5 points for all the three criteria: (i) the '*Scientific and/or Technological Excellence*'; (ii) '*Quality and efficiency of the implementation and the management*', and (iii) '*Potential impact through development, dissemination and use of project results*' (total score of 13.5 points). The winning consortium received 5 points for criterion (i), and 4.5 points for the other two criteria (total score of 14 points). Therefore, if the complainant's proposal had been awarded the same score as that of the winning proposal, the two proposals would have been prioritised on the basis of the score of the first criterion. This would have meant that the other proposal would still have ranked first.

13. In its observations, the complainant maintained its complaint. The complainant observed that the strict formatting of the proposal documentation did not allow it to attach these papers to its proposal. In any case, the complainant's proposal should not have been negatively scored for this alleged lack of commitments.

The Ombudsman's assessment

14. The Ombudsman points out that this aspect of her inquiry is limited to verifying whether the evaluation of the complainant's proposal was undermined by a **procedural defect** or a **manifest error of assessment**. It does not seek to replace the scientific assessment carried out by the evaluation committee.

15. Regarding such **manifest errors of assessment**, the complainant argued that the evaluation committee downgraded its proposal because of the supposed lack of written commitments by non-project partners.

16. The Ombudsman notes that the evaluation committee gave an overall score of 4.5 out of 5 points under criterion 2 (Quality and efficiency of the implementation and the management). The Evaluation Summary Report stated:

" *The management, structure and organisation of the project is of high quality and clearly*



presented in the proposal. The consortium is comprised of a large number of organisations but they are well balanced, have good experience, and contain very experienced individual participants. The consortium appears to be well organised and each member has appropriate expertise for their prospective work packages. The proposed Advisory Panel is an additional asset. Allocation of resources to the various work packages, including management, is appropriate and justified. The 'free' participation of several industrial partners is a significant asset to the project but the value of their contributions appears to be exaggerated in some cases and written confirmation of the commitment from non-project partners was not evident in the proposal. "

17. The Ombudsman notes that the Commission has specifically confirmed that the evaluation committee took a positive view as regards the participation of third parties in the complainant's proposal and clarified that the evaluation committee did not downgrade the complainant's proposal because of the absence of written confirmation of commitments from non-project partners. It stated that the comment by the evaluation committee, on the absence of written confirmations of commitments from such third parties, served simply to highlight an entirely reasonable suggestion from the evaluation committee, namely, that such commitments should be obtained *if* the complainant won the call.

18. The Ombudsman also notes that the complainant's proposal received a very high score indeed for criterion 2 (4.5 out of 5, which was, for that criterion, as high as the winning proposal). This would tend to support the view, put forward by the Commission, that no marks were unduly deducted from the complainant.

19. In any event, as explained by the Commission, even if it were the case that the complainant had received maximum points for criterion 2, it would not have been the best placed bid and would not have been awarded the funding.

20. In light of the above, the Ombudsman finds no maladministration regarding the complainant's first allegation that the Commission erred in the evaluation of its proposal. Accordingly, there are no grounds to pursue the complainant's related claim.

Allegation that the Commission discriminated against certain applicants

Arguments presented to the Ombudsman

21. The complainant stated that a Commission official had disclosed the results of the selection procedure during a scientific meeting in January 2013, two weeks before the complainant received the Commission's official letter with the evaluation of its proposal.

22. The Commission confirmed that information about the result of the evaluation had indeed been inadvertently and informally disclosed during the meeting. However, that meeting had



taken place after the conclusion of the experts' evaluation process. At that time, the Commission had not yet finalised its ranking of the proposals.

23. The Commission agreed that disclosure of the ranking of the proposals was not appropriate and that it should not have happened.

24. However, the Commission insisted, the leak did not give rise to any discrimination between the applicants.

25. First, the representatives of the highest ranked proposal and the complainant learned, at that same time, of the ranking of the proposals. Second, the Commission official, who had inadvertently and informally disclosed the ranking, had not participated in the panel covering this specific topic. Third, disclosure of the information had no impact on the Commission's ranked list, which was based on the ranking drawn up by the experts.

26. The Commission stated that it regretted that the complainant had received information on its proposal outside of the formal procedure. It also stated that it would re-enforce the relevant instructions to its staff so to avoid similar situations in the future.

27. The complainant stated that the above was evidence of the failings in the entire evaluation process.

The Ombudsman's assessment

28. The Ombudsman considers that the unofficial and premature disclosure by a Commission official, even if it was inadvertent, was a serious instance of maladministration. This premature and unauthorised disclosure had the potential to undermine trust in the award procedure, on the part of applicants, as well as on the part of the wider public. The Ombudsman considers that the Commission is correct to recognise that the disclosure was not appropriate and that it should not have happened. As the error cannot now be remedied, the Ombudsman will make a critical remark below in relation to the unauthorised disclosure. She hopes that this critical remark will serve to draw officials' attention to the need for discretion when dealing with sensitive information.

29. However, notwithstanding the above, the Ombudsman agrees with the Commission that the premature disclosure of the results did not influence the award procedure, given that the work of the experts had been completed when that disclosure occurred. Also, the disclosure did not constitute favourable treatment of any of the applicants, given that the disclosure was made in a public forum, and not to specific parties only.

Allegation that the Commission failed to meet the deadline set for the redress procedure



Arguments presented to the Ombudsman

30. Following the complainant's request for redress, the Commission stated that it would reply by 30 June 2013. However, the Commission sent the reply on 1 July 2013. It explained that the redress committee had met on 30 April 2013 and had finalised its reports towards the end of May 2013. Completion of internal review and signature procedures had meant that the Commission exceeded the set deadline by one day. Nevertheless, the Commission formally apologised to the complainant for the slight delay.

31. The Commission further explained that the indicative date for a reply depended on the number of redress requests received, the potential complexity of the relevant case, the availability and workload of redress committee members and the need to review and finalise the committee reports.

32. The complainant criticised the fact that it had taken the Commission only two months to assess the complex scientific research proposals, but three months to compile and send the redress protocol. The complainant considered this behaviour another Commission stalling tactic.

The Ombudsman's assessment

33. It is always good administration for the Commission to comply with the deadlines that it sets itself for replying to requests for redress. In the present case, the Commission sent the reply one day late. It has now explained why this very short delay occurred and has apologised for it. The Ombudsman considers that the Commission has taken the necessary steps to settle this matter.

Allegation that the Commission failed to address a conflict of interest situation

Arguments presented to the Ombudsman

34. The complainant alleged, during the inquiry, that the Commission failed to address a conflict of interest situation by one of the independent experts who evaluated the proposals. The complainant argued that an expert on the evaluation committee had undisclosed ties with the winning consortium. The complainant noted that the expert was the founding president of a large national interest group, the members of which were private and public national organisations active in the relevant industry. Two members of the winning consortium were also members of this national interest group, one of them having contributed substantially to its creation. Additionally, the complainant argued, the expert was the president of a "cluster" comprising several national energy companies, among them the same two members of the winning consortium.



35. The complainant alleged that Commission officials involved in the evaluation knew of the links between the expert and the consortium, but did not act upon this information.

36. The Commission did not dispute the accuracy of the additional information concerning the expert, which was publicly available information. However, it stated that this information had not been evident in the expert's *curriculum vitae*. Further, the information had not been known to the Commission officials responsible for the selection of the expert. According to the Commission, it was simply not possible to check potential indirect links with applicants through two or three degrees of separation, nor was such an action required by the Rules for Submission and Evaluation, which expressly defined disqualifying conflicts of interests and gave examples of potential conflicts of interest.

37. The Commission argued that the expert may not have indicated a disqualifying or potential conflict of interest in his declaration because he may have thought that involvement with the main national and European industry bodies in this area is a natural consequence of his expertise, and, indeed, proof of his expertise. He may thus have understood that this involvement could not in any way be perceived as a potential conflict of interest. The Commission added that it was only natural that some of the members of such associations would be interested in participating in EU-funded research programmes.

38. The Commission explained that involvement with associations whose members participate in proposals was not an immediate disqualifying conflict of interest, and that it was not uncommon for specialists in many scientific or policy areas to be associated with the main interest bodies in those areas. Such participation was not a presumption of compromised independence, rather the opposite.

39. Considering the circumstances of the case, and on the basis of the objective information at its disposal, the Commission took the view that the expert's activity was not to be seen as a situation of effective conflict of interest.

The Ombudsman's assessment

40. The Ombudsman notes that the Rules for Participation state that "when appointing an independent expert, the Commission shall take all necessary steps to ensure that the expert is not faced with a conflict of interests in relation to the matter on which the expert is required to provide an opinion" [3]. Experts are required to sign a declaration [4] that no such conflict of interest exists at the time of their appointment. They undertake to inform the Commission if one should arise in the course of their duties.

41. The Ombudsman commends the Commission for having put these guidelines in place. However, she has a number of concerns regarding how they were applied in the present case. According to the Commission, the activities of the independent expert made known to it by the complainant were neither evident nor known to the Commission when it made the selection of



experts. It also argued that a check for potential indirect links was neither possible nor required.

42. The Ombudsman considers that the Commission needs to have processes in place which ensure that conflicts of interest are identified .

43. First, experts should carry out a **self-assessment** as regards whether they are in a conflict of interest. In this context, the Commission should provide guidance as regards what the experts' specific tasks will be, in order to allow experts to evaluate if any private interest conflicts with any of those tasks. It should also explain how certain situations may give rise to conflicts of interests or appearances of a conflict of interest. The Ombudsman notes that the Commission provides such guidance in the independent experts' appointing letter.

44. Second, experts should provide the Commission with all necessary information concerning all their relevant interests (and not only those interests which the expert considers might give rise to a conflict of interest). Based on this information, **the Commission should then itself examine whether these interests give rise to a conflict of interest** , or an appearance of a conflict of interest, concerning the expert. An **appearance of a conflict of interest** exists when, despite the fact that a person asked to participate in a public authority's decision making process **has not been shown to be in a conflict of interest** , members of the public have, on the basis of the information publicly available relating to that person, **reasonable doubts** about the person's independence.

45. The Ombudsman notes that conflict of interest rules serve not only to ensure that public authorities take decisions in the public interest (as opposed to taking decisions that reflect private interests), but also to guarantee public trust in the objectivity, fairness and transparency of the decisions. If such trust is undermined, especially in an area where a significant amount of public funds is disbursed, the European institutions and the Union itself will lose legitimacy in the eyes of European citizens.

46. The Ombudsman acknowledges that is not uncommon for experts in a given field to be members of general professional associations in their areas of specialisation. Indeed, in certain highly complex areas, such participation in professional bodies is vital to ensure that expertise is maintained and improved. The Ombudsman thus agrees with the Commission that the participation of the expert in the same professional association as two members of the winning consortium **does not, absent any other evidence of close links with the winning consortium, lead to the conclusion that the independence of the expert concerned was compromised .**

47. Nevertheless, she understands how this might, in the eyes of the public, **give rise to an appearance of a conflict of interest** , especially where the public might not be fully aware of how such professional bodies function. It is in the interests of the European institutions to deal effectively with such situations, by obtaining, and making public where necessary, more detailed information aimed at dispelling any such reasonable doubts. This could include asking the experts concerned to explain in more detail the work of the professional associations in which they participate and their role in those associations. In particular they should be asked to clarify



if their participation in those associations involves any financial ties, or equivalent strong ties, with other members of such professional organisations.

48. In the case at hand, the Ombudsman considers that the Commission failed to deal with this challenge. It did not obtain such information. Therefore, it did not provide the complainant with sufficient information to dispel its reasonable doubts. The Commission's failure to properly manage and address this appearance of a conflict of interest constitutes maladministration.

49. The Commission could deal with this challenge more effectively in the future. It could provide the necessary guidance to its independent experts on how to identify and declare any relevant interests. This declaration could contain, for example, a request to include information on membership of associations and the role, if any, of the expert within those associations. This would contribute to preventing situations, such as in this case, where information later emerges that prompts third parties to question whether there was a conflict of interest.

50. The Commission might also consider, where it has doubts as regards whether an expert has declared all relevant interests, using reliable public sources to identify if the expert has other non-declared interests. This is particularly important in highly specialised areas where it is to be expected that experts will have at least some contacts with parties seeking EU funding (for example, through specialised professional organisations). Such a proactive approach is all the more important if the funding is significant. If such a search reveals that relevant undeclared interests exist, the expert should be asked to provide all necessary information in relation thereto to allow the Commission to evaluate if there is a conflict of interest.

51. In this regard, with a view to improving the Commission's procedures in line with the principle of good administration, the Ombudsman makes corresponding further remarks.

Conclusion

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

While there was no maladministration in the evaluation of the complainant's proposal, the Commission's premature disclosure of the evaluation results constitutes maladministration.

The Commission's failure to properly manage and address the appearance of a conflict of interest constitutes maladministration.

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

Further remarks



The Commission should take measures to prevent appearances of conflicts of interest concerning independent experts from arising, by ensuring that all necessary information, for example on membership of associations and the role, if any, of the expert within those associations, is provided to its services.

If an appearance of a conflict of interest arises, the Commission should either provide the public with sufficient information to dispel any reasonable doubts about the independence of the expert, or, if it is not possible to provide any additional information, or if that additional information does not dispel the reasonable doubts about the independence of the expert, the Commission should exclude the expert from the evaluation process.

Where the Commission has doubts as to whether an expert has declared all relevant interests, it should use reliable public sources to identify if the expert has other non-declared interests.

Emily O'Reilly

Strasbourg, 25/05/2016

[1] In September 2014, the complainant made additional observations on the Commission's opinion.

[2] The Commission's Cooperation Work Programme for 2013, the Call for Proposals and the Guide to Applicants for the call, available under <https://ec.europa.eu/research/participants/portal/desktop/en/opportunities/fp7/calls/fp7-energy-2013-1.html> [Link]

[3] Article 17(3) of the EC Rules for Participation, Regulation (EC) no 1906/2006 of the European Parliament and of the Council of 18 December 2006 laying down the rules for the participation of undertakings, research centres and universities in actions under the Seventh Framework Programme and for the dissemination of research results (2007-2013), OJ 2006 L 391, p. 1.

[4] See Annex F of the Rules for Submission and Evaluation (Commission Decision of 28 February 2011 amending Decision C(2008) 4617 related to the rules for proposals submission, evaluation, selection and award procedures for indirect actions under the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013) and under the Seventh Framework Programme of the European Atomic Energy Community (Euratom) for nuclear research and training activities (2007-2011), OJ 2001 L 75, p. 1.).