Decision in case 1874/2013/MG on alleged irregularities in a European Commission tendering procedure

Decision
Case 1874/2013/MG - **Opened on** 28/10/2013 - **Decision on** 29/08/2016 - **Institution concerned** European Commission (No maladministration found) |

The complainant is an IT company which participated in a Commission tender. The Commission asked all tenderers to complete two case studies to allow it to evaluate their technical abilities.

The complainant took issue with the fact that one of the case studies was very similar to a tender recently organised by an EU agency. It alleged that this gave the companies which had won that tender a competitive advantage in the Commission tender. The complainant also took issue with the Commission's decision not to disclose the names of the persons who evaluated the proposals for the Commission.

Following her inquiry, the Ombudsman concluded that the Commission's design of the tender procedure did not confer a competitive advantage on the winning tenderer. As regards the disclosure of the names of the evaluators, the Ombudsman suggests that the Commission consider releasing such names in the future.

The background to the complaint
1. The complainant is a Greek IT company that participated in a tender for IT services (the services related to reviewing the usability of websites) launched by the European Commission in October 2012. The tender specifications required the tenderers to work on two case studies. Case Study 1 concerned Commission websites. Under Case Study 2, the tenderers had to carry out an "expert review" of either the European Food Safety Authority (EFSA) website or the European Centre for Disease Prevention and Control website. In an "expert review", a "usability expert" seeks to identify problems which a user might encounter when using a website. If the expert identifies problems, he or she proposes solutions and appropriate changes.

2. In November 2012, during the tender procedure, the complainant informed the Commission that **Company X** enjoyed an advantage over other bidders in the tender as it was the incumbent provider of IT services to the Commission. It thus had, the complainant argued, access to information about the Commission's websites that others did not have. The complainant also informed the Commission that Case Study 2 was very similar to a real contract recently awarded by EFSA to Company X. The complainant thus took the view that Company X also had an advantage over competitors in relation to Case Study 2.

3. The Commission rejected these allegations. It stated that all potential bidders were provided with all the information available to the incumbent contractor. It therefore concluded that all bidders were treated equally.

4. In May 2013, the complainant was informed that its tender bid was not successful. It was also informed that Company X had not won the tender, but that the contract had in fact been awarded to a consortium of two companies.

5. The complainant then asked the Commission to provide it with information about the successful consortium and its subcontractors. It also asked for the names of the members of the Commission's Evaluation Committee. It argued that it needed this information to assess whether the tender procedure had been conducted impartially.

6. The Commission provided the complainant with the name of the winning consortium and of the two companies that made up that consortium. However, it did not disclose the names of their subcontractors. It argued that the release of the names of subcontractors would undermine "legitimate business interests of undertakings" and lead to a "distortion of competition". It also refused to disclose the names of the members of the Evaluation Committee. It argued that disclosing the names, which constituted personal data, would undermine the protection of the privacy and integrity of the members of the Evaluation Committee. It also argued that the complainant had failed to establish the necessity of having the names transferred to it, which was a requirement under the EU's data protection legislation.

7. The complainant then informed the Commission that one of the subcontractors of the winning consortium in the Commission tender, **Subcontractor Y** , had previously carried out an expert review of the EFSA website for Company X. Therefore, it argued, the **winning consortium** had also enjoyed an advantage in the Commission tender procedure. To support this allegation, the complainant provided the Commission with screenshots from the website of Subcontractor Y, which included references to the fact that Subcontractor Y had carried out that work. The complainant also criticised the Commission for not informing it that Subcontractor Y had worked for the winning bidder.

8. In August 2013, the complainant turned to the Ombudsman.

The inquiry

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

Allegations:

1) The Commission breached the principle of equal treatment by requesting tenderers to submit Case Study 2, the scope of which was similar to a project in the implementation of which the successful tenderer had participated.

2) The Commission failed to provide the complainant with the names of the Members of the

Evaluation Committee.

Claim:

The Commission should remedy the damage it caused to the complainant.

10. 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. She also inspected the Commission's file on the case. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Alleged irregularities in the Commission's tender procedure

Arguments presented to the Ombudsman

11. The Commission, in its opinion, confirmed that Subcontractor Y was one of the subcontractors to the consortium which won the Commission tender.

12. The Commission also confirmed that EFSA had, prior to the tender call in this case, awarded a contract in relation to the development of its website to Company X [1] .

13. The Commission also noted, after reviewing the information on Subcontractor Y which the complainant had retrieved online, that Subcontractor Y had carried out an expert review of the EFSA website in **March 2012** . However, the Commission stated, it had no specific knowledge about the role of Subcontractor Y in the EFSA tendering procedure. However, it assumed that the work had been commissioned by the company that won the EFSA tender procedure (that is, by Company X).

14. The Commission then explained that since Case Study 1 related to websites of the Commission, it had decided that the Case Study 2 should focus on the websites of other EU institutions or bodies. The Commission had no knowledge about the EFSA website other than knowledge derived from examining **the public version of that website** . The tasks demanded by Case Study 2 were therefore, it stated, **based only on publicly available information** , that is, **information which was available to all tenderers** . The Commission noted that the fact that a potential tenderer might have had some degree of knowledge of a project concerning EFSA's website did not provide it with a competitive advantage.

15. Lastly, regarding the request for the names of the Evaluation Committee members, the Commission noted that neither the Financial Regulation nor its Rules of Application [2] provide for the communication of the names of the Evaluation Committee members. The request concerned personal data and had to be processed in accordance with Regulation 45/2001 (that

is, the Regulation governing the processing of personal data by EU institutions and bodies [3]). Under this Regulation, a person seeking to access the personal data of a third party must establish that there is a necessity to have this data transferred; the complainant had failed to show that there was such a necessity in the present case. The complainant had merely stated that it needed this information to check whether a conflict of interest existed. In any event, the Commission had already taken all the necessary steps to ensure that no such conflicts existed.

16. In its observations, the complainant repeated its view that the Case Study 2 was identical to the project that had already been completed by Subcontractor Y. The complainant alleged that the call for tenders at issue was thus designed to benefit the winning consortium. It argued that the Commission should have removed Case Study 2 from the tender specifications.

17. The complainant also criticised the Commission for not disclosing, in a timely manner, that Subcontractor Y was one of the subcontractors to the winning consortium. In its view, the Commission had failed to explain how disclosing the names of subcontractors would affect their legitimate interests and distort competition, especially when such disclosure would take place after the winning tender was selected. Furthermore, Subcontractor Y had disclosed that information on its own website.

18. As to the disclosure of names of the members of the Evaluation Committee, the complainant stated the names do not constitute personal data. The complainant insisted that it has a right to know them, without having to explain why such transfer of data is necessary.

The inspection of documents

19. After receiving the complainant's observations, the Ombudsman inspected the Commission's file and obtained copies of the relevant documents, namely the decision to appoint the Evaluation Committee, the declarations of absence of conflict of interest and confidentiality submitted by the Evaluation Committee members and the technical evaluation of Case Study 2 for the tender proposal submitted by the companies which were successful in the EFSA tendering procedure. The documents were marked as confidential.

20. The complainant reiterated that the names of the evaluators should not be kept confidential. This was, in its view, the only way to ensure a complete absence of conflicts of interest.

The Ombudsman's assessment

21. As a preliminary point, the Ombudsman notes that the complainant **specifically** asked the Commission to provide it with the names of any subcontractors of the winning consortium (see paragraphs 5 and 6 above). The Commission did not provide that information to the complainant when first asked. It argued that the release of the names of subcontractors would undermine "legitimate business interests of undertakings" and lead to a "distortion of competition".

22. The Ombudsman agrees that there are valid commercial reasons why a company may not wish the Commission to reveal, to the company's competitors, who the company's subcontractors are. For example, competitors may use that information to entice the subcontractors of winning tenderers to work for them in an effort to improve their performance in future tender procedures. Thus, the Ombudsman does not question the standard practice of the Commission not to reveal the names of subcontractors.

23. However, the fact that the standard practice is not to reveal the names of subcontractors does not exclude the possibility that there may be exceptional circumstances in which such information should be released.

24. The Ombudsman notes that the complainant was subsequently able to obtain information about the work of Subcontractor Y for the consortium which won the Commission tender (and the earlier work of Subcontractor Y for Company X), **from public sources** (presumably it obtained it from the website of Subcontractor Y). Had the Commission known that information about the work of Subcontractor Y for the winning consortium was being made publicly available by Subcontractor Y, the Commission could not have argued that the fact that Subcontractor Y was a subcontractor of the winning consortium was commercially confidential information.

25. However, there is no reason to believe that the Commission knew that Subcontractor Y was making that information available on its website when the Commission decided, in accordance with its standard procedure, not to inform the complainant that Subcontractor Y was a subcontractor of the winning consortium.

26. The Ombudsman also notes that the Commission has now confirmed, in its opinion, that Subcontractor Y was indeed a subcontractor to the winning consortium when it was informed that Subcontractor Y had already made this information public. Thus, no further inquiries are necessary into this aspect of the complaint.

The alleged unequal treatment of tenderers

27. As regards the alleged unequal treatment of tenderers, the Ombudsman notes that Subcontractor Y was one of the subcontractors to the consortium which won the Commission tender. When competing to win that tender, the consortium had the option of carrying out an expert review of the EFSA website. Subcontractor Y had previously provided services for Company X, which had won the earlier EFSA tender. In the context of that earlier work, Subcontractor Y carried out an expert review of the EFSA website. The question is therefore whether Subcontractor Y's earlier expert review of the EFSA website gave the consortium, with which Subcontractor Y now worked, an unfair advantage over their competitors **in the Commission's tender procedure.**

28. The Ombudsman notes that it was **Company X** which won the EFSA contract. It is thus quite possible that **Company X** obtained, **during the period working with EFSA** , at least

some additional knowledge of the EFSA website. In particular, it might have obtained insights into the **real problems** encountered by users when using the EFSA website and into the **real solutions** put forward for those problems (the Ombudsman notes that Case Study 2 involved an "expert review", where a "usability expert" seeks to identify **problems** which a user might encounter when using a website and then proposes **solutions** and appropriate changes).

29. However, Company X did not win the Commission tender. More relevantly, the complainant does not, in its complaint to the Ombudsman, focus on whether Company X had an advantage over it in the Commission's tender procedure. Rather, it focuses only on whether **the winning consortium had** , by virtue of using the services of Subcontractor Y, an advantage over it in the Commission's tender procedure.

30. However, the Ombudsman notes, Subcontractor Y's expert review of the EFSA website, in the context of the EFSA tender procedure, was carried out in **March 2012.** This was 4 months **before** Company X was awarded the contract with EFSA (that contract was awarded in **June 2012**). Thus, any work carried out by Subcontractor Y for Company X, in March 2012, could have been based only **on the public version of the EFSA website** since Subcontractor Y had no involvement with the EFSA website other than to have conducted an expert review of the **publicly available version of that website** . Thus, the Ombudsman finds, there is no evidence that Subcontractor Y was privy to any information about the EFSA website which **would not also have been available to any other person or company participating in the Commission tender** .

31. While Subcontractor Y did not have any access to privileged information about the EFSA website, it is true that its experience working on the public version of the EFSA website, in the recent past, might have conferred some immediate "first mover" advantage on it (and thus on its partners) in the context of the later Commission tender procedure. However, such an immediate "first mover" advantage could easily be eliminated, the Ombudsman observes, if other tenderers were given, in the context of the new Commission tender, adequate time to analyse that same information.

32. In this regard, the Ombudsman notes that the complainant, in its letter to the Commission following the submission of its proposal, alluded to this very point. It stated that:

" *Tenderers were / are invited to produce* **within a small time period** *, a thorough work, which has* **been already delivered by the incumbent contractor** *,* **over a much longer period of time** *than* **the restricted time available for the preparation of a tender** *, enjoying continuous cooperation and interaction with the Commission, having access to all the necessary information and material (which are not available to the tenderers)* [...] *It is crystal clear that* **under these circumstances** *no tenderer can possibly compete on a level playing basis with the incumbent contractor, who will certainly present the best Case Studies, with limited (if any) effort!* "

33. Now, that statement was made **in relation to Company X** , primarily in relation to the fact that Company X had been the incumbent IT service provider to the Commission for a number of years. It had also won the EFSA tender a few months before the Commission tender was

launched.

34. It is arguable that this "first mover" advantage of Company X was significant, given the extent of its work within the Commission, and its recent work within EFSA. However, the same cannot be said for Subcontractor Y, which worked only **on the public version of the EFSA website when assisting Company X to win the EFSA tender** . As such, in the Ombudsman's view, any immediate "first mover" advantage accruing to Subcontractor Y would have been eliminated entirely **provided the bidders in the new Commission tender were given sufficient time to prepare Case Study 2** . Thus, this **immediate "first mover" advantage** would constitute an **unfair advantage in the context of the new Commission tender** only if other bidders, who may not have worked on the EFSA website earlier, were not given enough time, during the Commission tender procedure, to examine the public version of the EFSA website and to carry out their own "expert review" of that website.

35. The Ombudsman has examined the timelines of the tender call. She notes that the tenderers were given **two and a half months to submit their proposals** . This time appears sufficient for tenderers to have familiarised themselves with the information needed to complete the case studies, at least to an extent which would have compensated for the fact that Subcontractor Y carried out work on the public version of the EFSA website in early 2012.

36. Neither does the Ombudsman agree with the complainant's view that the Commission **intended** to favour Subcontractor Y and its partners by deliberately choosing EFSA's website for Case Study 2. If there were any doubts as regards this issue, it would relate only to whether the Commission intended to favour **Company X** , which was actually awarded the EFSA contract and which was the incumbent Commission contractor. This view is supported by the fact that the complainant insisted, throughout the tender procedure, that the Commission **was favouring the incumbent contractor, Company X** . It changed its view on that matter only when Company X failed to win the new Commission tender.

37. Thus, the Ombudsman concludes that Subcontractor Y, and by extension the winning bidder, was not given any unfair advantage in relation to the completion of Case Study 2 in the Commission tender. There is thus no evidence of maladministration as regards this aspect of the complaint.

38. The Ombudsman stresses that this finding of no maladministration relates only to whether the winning tenderer was given an unfair advantage (see paragraph 27 above). The Ombudsman has serious concerns, however, that Company X may have been given an unfair advantage in the tender. The Commission should take all necessary steps to avoid such situations in the future. Thus, the Ombudsman makes a suggestion that the Commission examine very carefully whether incumbent suppliers are given an unfair advantage when it draws up calls for tender.

The failure to disclose names of the Evaluation Committee members

39. The names of the Evaluation Committee members constitute personal data. Article 8 of Regulation 45/2001 states that:

"[...] personal data shall only be transferred [...] if the recipient establishes the **necessity** *of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced."*

40. It was therefore for the complainant to put forward reasons establishing that the disclosure of their names was *necessary* . The Commission informed the complainant in its letters of May and September 2013 that the complainant had not established the necessity of having the relevant personal data transferred.

41. The complainant stated that it needed "the names of the members of the Evaluation Committee in order to check potential conflicts of interest".

42. The Ombudsman agrees with the Commission that such a claim is not sufficient to establish the necessity (in the sense of Article 8(b) of Regulation 45/2001) for the transfer of the personal data. The nature of the claim is vague and is limited to considerations of a general and abstract nature (in this respect, reference is made to the *ClientEarth* case [4]). It should be underlined that in that *ClientEarth* case, the NGO seeking public access to documents had shown, through a study, that the EU agency concerned often used **external experts** with links to industry to carry out evaluations. This information implied that the suspicions of the NGO went beyond mere presumptions, and were thus reasonable. These reasonable suspicions could, then, only be dispelled by access to the names of the experts that dealt with the files in question. In contrast, the Ombudsman notes that Evaluation Committee members are Commission staff, and not external experts. As such they could not, without seriously breaching the Staff Regulations, have worked for the winning tenderer or otherwise had links to the winning tenderer. It cannot ever, of course, be excluded that officials might, in contravention of the Staff Regulations, have formed such links. However, the complainant did not put forward **any facts** to support its suspicions that the evaluators had links to the winning tenderer—in fact, its suspicions are vague and wholly unsubstantiated. The Commission was thus entitled to judge that the "necessity test" had not been met.

43. In this particular case, the Ombudsman accepts that the Commission was acting within its legal rights in refusing to disclose the names of the evaluators. Nevertheless, the Ombudsman takes the view that good administration is best served by adopting the general practice that the names of evaluators in such cases will be disclosed. Refusing to disclose the names of such evaluators inevitably generates suspicion and mistrust. The Ombudsman is of the view that the Commission should, in the future, disclose the names of Evaluation Committee members proactively once the tender procedure has been concluded. In order to do so in a manner consistent with the data protection requirements of Regulation 45/2001, the Commission would simply have to inform potential members of the Evaluation Committees in advance that its practice is to release such names after tenders have been completed. The Ombudsman is convinced that such a change would contribute to building greater trust and confidence in the

work of the Commission. The Ombudsman notes that such a change would be consistent with practice in other areas in which the Commission works. For example, the established practice has been to disclose the names of the board members involved in staff selection and recruitment. Moreover, the complainant furnished evidence that various EU institutions and agencies, including the Commission itself, have disclosed the names of Evaluation Committee members in the past.

Conclusions

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

The Ombudsman finds no maladministration by the Commission.

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

Suggestions

The Commission should ensure that calls for the provision of goods or services are designed in such a way as not to favour any potential bidder, especially incumbent suppliers.

The Commission should adopt the practice of proactively releasing the names of the Evaluation Committee members in the future after tenders have been completed.

Emily O'Reilly

European Ombudsman

Strasbourg, 29/08/2016

[1] Lot title CT/EFSA/COMM/2012/04 - Other services for digital communications, Lot no. 3, Contract no. 4, Contract award notice published in OJ/S S123, p. 4.

[2] Available at: http://ec.europa.eu/budget/biblio/documents/regulations/regulations_en.cfm [Link]

[3] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 8, p. 1.

[4] Judgment in *ClientEarth v EFSA,* C-615/13 P, EU:C:2015:489, paragraphs 53-59. In that judgment, the Court set aside the refusal to grant access to the names of external experts, which were asked to provide their opinion on a draft EFSA guidance policy. The Court noted that the request was based on the existence of a " *climate of suspicion of EFSA, often accused of partiality because of its use of experts with vested interests due to their links with industrial lobbies [...].* " The request **was supported** by a " *study, which identified the links between a majority of the expert members of an EFSA working group and industrial lobbies.* " In the view of the Court, obtaining the names of the experts " *was necessary so that the impartiality of each of those experts in carrying out their tasks as scientists in the service of EFSA could be specifically ascertained."*