

## **Decision of the European Ombudsman on complaint 2377/2013/(PMC)DR concerning the European Court of Justice's rules governing a tender procedure in the field of translations**

Decision

**Case 2377/2013/DR - Opened on 08/01/2014 - Decision on 01/09/2016 - Institution concerned** Court of Justice of the European Union ( No maladministration found ) |

The case concerned the evaluation by the European Court of Justice of two tenders for legal translation services. The complainant, an unsuccessful tenderer, alleged that the tender procedure did not meet the standards of good administration because (i) the evaluation of the tenders was not properly documented, (ii) there was no opportunity to ask for an internal administrative review and (iii) it did not guarantee anonymity.

The Ombudsman inquired into the issue and found no maladministration by the Court. The Ombudsman, however, made three suggestions for improvement to the Court, namely that it (i) require internal evaluators to sign and date the evaluation sheets of tests, (ii) set up an internal review mechanism for dealing with complaints by unsuccessful applicants and (iii) anonymise the tests of tenderers for the purposes of the assessment made by the internal evaluators during the evaluation process.

### **The background to the complaint**

1. The complainant is a Portuguese entrepreneur. She owns a small Portuguese translation company specialising in legal and financial translation. In 2013, the complainant submitted two bids to provide legal translation services to the European Court of Justice, from English and French into Portuguese. The type of procedure used for the award of contracts was a negotiated procedure. [1]

2. On 18 April 2013, the complainant sent documents to the Court in the first stage of the tender procedure. On 6 June 2013, the Court invited the complainant to submit a tender (second stage of the procedure) and to provide two test translations, as part of the tender procedure.

3. On 25 June 2013, the complainant sent two test translations to the Court by registered mail. On 30 June 2013, the Court acknowledged receipt of both test translations.



4. On 25 November 2013, the Court informed the complainant that her bids had been rejected because the test translations did not " *reach the minimum level of quality required in Article 4.3.1 of the tendering specifications* " [2] . It also informed the complainant about the possibility to challenge that decision before the Court of Justice in accordance with Article 263 of the Treaty on the Functioning of the European Union (TFEU) or to complain to the European Ombudsman within a period of two years.

5. On the same day, the complainant replied, expressing her surprise at the result of the evaluation and requesting a copy of the Court's assessment of the test translations or, if this was not possible, more detailed information on the appeal procedures available. Having not received any reply, the complainant repeated her request on 30 November 2013.

6. On 2 December 2013, the Court replied that " *the two and only appeal procedures that excluded candidates may use are an appeal before the Court under article 263 TFEU or a complaint to the Ombudsman* " and that " *even though this is not provided for by the rules of this competition, [the Court's services are] currently preparing more detailed information about the assessment of [the complainant's] translation and the reasons that led to [the complainant's] exclusion. [The Court's services would] provide that information as soon as possible, but certainly not by the 6th December* ".

7. On the same day, the complainant replied that she might eventually lodge a complaint with the Ombudsman, but this was " *quite different from an appeal in the context of a public tender procedure* ".

8. The complainant also contended that the practice concerning tenders launched by private companies or even public procurement tenders usually provide for an internal appeal procedure before a matter is brought before a competent court.

9. The complainant added that the Court should have prepared an evaluation for all test translations against a set of predetermined quality criteria and/or an " *ideal translation* " for the texts in question, which would be provided to any unsuccessful tenderer.

10. Finally, the complaint argued that providing tenderers with a detailed evaluation of their bids is a standard practice. The complainant added that all the tenderers should know the criteria used to evaluate bids. It was the first time that the complainant was confronted with a tender procedure in which the evaluation criteria were not made public.

11. On 10 December 2013, the Court provided the complainant with an evaluation of the bids, giving examples of translation mistakes, inadequate, imprecise or incorrect language use, literal translations and citation mistakes, for both the English and the French tests translations.

12. On 15 December 2013, the complainant turned to the Ombudsman.

13. A few days later, on 19 December 2013, the complainant replied to the Court's letter of 10



December 2013. In particular, she (i) contested the seriousness of certain errors identified in the test translations, taking the view that some of them were matters of personal preference, (ii) pointed out that the Court had not provided a classification grid nor the evaluation criteria and their relative weighting, (iii) asserted that the evaluation of her test translations had not been carried out until after the complainant had requested additional explanations and (iv) stated that the procedure was not impartial and lacked the required degree of professionalism.

**14.** On 28 April 2014, the Court replied that "*following a scrupulous examination of the matters which [the complainant] set out, [her] objections numbered (i) and (iv) appear [ed] unfounded*". In respect to the two other points, numbered (ii) and (iii), the Court informed her that, since the complainant raised them already in her complaint to the Ombudsman, the Court would reply within the context of the Ombudsman's inquiry.

## The inquiry

**15.** The Ombudsman opened an inquiry into the complaint and identified the following allegations, supporting arguments and claim:

### *Allegations:*

The tender procedure did not meet standards of good administration because (i) the evaluation of tenders was not adequately documented, (ii) there was no possibility to seek internal administrative review of the rejection of a tender, and (iii) it failed to guarantee anonymity.

The complainant put forward the following supporting arguments:

In support of (i), the complainant argued that the Court did not document the evaluation of her tenders at the time of the actual evaluation and she inferred that such documentation was not prepared contemporaneously.

In support of (ii), the complainant pointed out that the external appeal procedures available (litigation or complaints to the Ombudsman) were not an adequate substitute for an internal administrative review.

In support of (iii), the complainant implied that the lack of anonymity contradicts the principle of equal treatment of tenderers.

### *Claim:*

Future tender procedures should meet standards of good administration, especially as regards (i) the adequate documentation of the evaluation of tenders, (ii) the possibility to seek internal administrative review of the rejection of a tender, and (iii) the guarantee of anonymity in



submitting tender proposals.

16. In the course of the inquiry, the Ombudsman received the opinion of the Court of Justice on the complaint and, subsequently, the comments of the complainant in response to the Court's opinion. The Ombudsman also requested further clarification from the Court regarding the tender documentation and, in particular, the evaluation of the complainant's test translations. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

## **Allegation that the evaluation of tenders was not adequately documented and related claim**

### **Arguments presented to the Ombudsman**

17. In support of the first allegation, **the complainant** argued, primarily, that the Court did not document the evaluation of her tenders until after she had requested explanations. The complainant also argued that the tender evaluation was not sufficiently documented because the Court (a) did not distinguish between the additional information provided about each of the two test translations and (b) failed to rank in importance the errors found. She also contended that (c) the Court had failed to provide, in the documents for the call for tenders, information about the application of the quality requirements, an evaluation grid, the evaluation criteria, as well as how each relevant point would be awarded for each translation.

18. In its opinion, **the Court** rejected the complainant's argument that the evaluation of the tenders had not been documented until after the event. The Court referred to the general practice in the case of such evaluations, according to which " *generally, for each test translation, each of the markers, in the course of, and therefore concomitantly with, his evaluation, entered his observations on the assessment sheet and could make notes in the margin of a copy of the test translation itself*". According to the Court, " *the position was no different for the evaluation of the two test translations submitted by the complainant*" and thus " *the evaluation of those test translations was therefore documented concomitantly with the evaluation*".

19. The Court also stated that, while it drew up a specific document subsequent to the evaluation, that took the form of the letter of 10 December 2013, that was " *only to inform the complainant in the most clear way of the grounds for the rejection of her tenders, by presenting (...) in a structured way the errors which were noted at the time of the evaluation in each of her two test translations*".

20. In particular, the Court stated that the letter of 10 December 2013 was structured in such a way as to distinguish between the information relating to the test translations for each language and that the contracting authority had no obligation to disclose its marking system or evaluation methodology and thus to rank in importance errors found in the test translations. As regards the



complainant's arguments on certain omissions in the call to tender documents, the Court observed that the allegation at hand concerns the way the tender evaluation was documented and not the documents included in the call for tenders. In any event, the Rules of Application of the Financial Regulation [3] oblige the contracting authority only to state the award criteria and their relative weighting, which the Court did in this case.

**21. The complainant** made no observations in this respect.

## The Ombudsman's assessment

**22.** The Ombudsman was not convinced initially by the Court's argument regarding when the evaluation of the test translations was documented. On one hand, the Court admitted that its letter of 10 December 2013, providing the complainant with an evaluation of her tenders, was an "*a posteriori specific document*"; and on the other hand, the Court did not provide any convincing evidence that the evaluation had been documented at the point when the evaluation was done.

**23.** Therefore, the Ombudsman requested clarification from the Court on the matter. As a result, the Court made available to the Ombudsman the (undated) evaluation sheets of the complainant's test translations, which had been carried out by two individual evaluators for each test translation. In addition, the Court provided (i) a report, dated 20 October 2013, of the committee of the Portuguese translation unit on the evaluation and ranking of the bids, and (ii) a report, dated 21 November 2013, of the evaluation committee - established on the basis of Article 158 of the Rules of Application - on the evaluation and ranking of requests to participate and of the tenders that satisfied the requirements.

**24.** The Ombudsman notes that the individual evaluators did not mention, on the evaluation sheets, the date(s) when they evaluated the complainant's test translations. Therefore, the Ombudsman is not able to confirm, as claimed by the Court, that the evaluation sheets were drawn up at the same time as the evaluation.

**25.** However, the Ombudsman notes that the two reports mentioned above, on the evaluation and ranking of tenders are, in contrast, dated. In addition, both these reports mention the reason why the complainant's tenders were excluded, namely, the fact that the quality of the test translations was below 50 points, that is, below the minimum quality level required in the tendering specifications.

**26.** There is no doubt that the conclusions of those reports were based on the results of the evaluation of the test translations, and, implicitly, on the evaluation sheets. Thus, despite the evaluators' oversight in not recording the date of their evaluation on the evaluation sheets, the evaluation sheets must have been drawn up, at the latest, by 20 October 2013 and, thus before 25 November 2013, the date when the complainant was informed of the rejection of her tenders. Hence, the Ombudsman concludes that the Court complied with its obligation to document properly the evaluation and ranking of the tenders submitted [4] .



27. It follows from the above that the complainant's assertion, that the evaluation of her test translations had not been documented at the time of the actual evaluation, is not well founded. As regards the other arguments raised by the complainant (see point 17 above), the Ombudsman finds that the explanations provided by the Court in its opinion are reasonable and convincing. As the Court pointed out - without being contested by the complainant - its letter of 10 December 2013 clearly distinguished between the information relating to each of the test translations (from English into Portuguese and from French into Portuguese) submitted by the complainant. In addition, it appears from that letter that the Court, although it did not rank the errors found in the test translations, gave the complainant sufficient information on the types, on the seriousness and on the extent of the errors or weaknesses identified therein. Finally, it also appears undisputed that the Court complied with its obligation to provide the information required by the Financial Regulation and its Rules of Application.

28. The Ombudsman thus does not find any maladministration in relation to the complainant's allegation. She wishes however to emphasize that the Court's services in charge of the evaluation of translation tests should ensure that, in the future, evaluation sheets are properly drawn up and duly signed **and dated** .

## **Allegation that there was no possibility to seek internal administrative review of the rejection of a tender and related claim**

### **Arguments presented to the Ombudsman**

29. **The complainant** argued that the external means of redress identified by the Court were not an adequate substitute for an internal administrative review.

30. In its opinion, **the Court** noted that the EU legislators did not establish an administrative appeal procedure in the context of the procedure for the award of public contracts by the institutions of the European Union [5] . The Financial Regulation and the Rules of Application provide, nevertheless, for mechanisms the effects of which are similar to those of such a procedure [6] . They create mechanisms enabling the contracting authority, both before and after the signature of the contract with the successful tenderer, to take measures - such as the suspension of the signature of the contract, cancellation of the procedure or termination of the contract - when this is necessary to deal with complaints submitted by unsuccessful tenderers.

31. Moreover, the Court emphasized that, whilst it was not required to set up a formalized procedure for internal administrative review of decisions taken regarding procedures for the award of public contracts, mechanisms with similar effect do exist and the complainant had indeed made use of them. In this respect, the Court referred to the fact that the complainant had the possibility to raise her concerns in her e-mail of 19 December 2013, and that the Court fully replied to it on 28 April 2014.



32. In her observations on the Court's opinion, **the complainant** expressed her disappointment with the Court's position and with its " *inability to carry out an independent assessment of its internal procedures* ".

## The Ombudsman's assessment

33. The Ombudsman notes that the Contract notice in question states that tenderers can lodge an appeal before the EU Courts in accordance with Article 263 TFEU [7] or can turn to the Ombudsman. It does not refer to any alternative means of resolving disputes.

34. The Ombudsman takes note of the Court's statement that contracting authorities are not obliged by law to put in place internal review mechanisms and that references to the possibility of challenging a decision before the Court in an action for annulment, or of submitting a complaint to the Ombudsman, are sufficient. However, the Ombudsman has constantly stated, good administration goes beyond legal obligations. To win citizens' trust and acceptance, a public administration needs to be accountable and responsive. That implies readiness of the administration to explain and to justify its decisions through genuine and meaningful dialogue with citizens.

35. It is the Ombudsman's view that each EU institution, which is in frequent contact with persons who may have reason to complain, should put in place a procedure that makes provision for grievances to be addressed and resolved **rapidly by the institution itself** , before those persons use other external redress mechanisms, such as the Ombudsman and the courts [8] . This is because such a procedure is likely to address a complainant's grievances more expeditiously and even effectively (since action can be taken before a formal decision on the issue complained about has been taken). An internal review mechanism provides a quick, inexpensive and easily accessible form of review. It is also a useful accountability tool and a quality control mechanism, which, by way of feedback to the institution setting it up, is likely to influence positively its decision-making process. Such a system is thus beneficial both to complainants and to the institution concerned.

36. Therefore, the Ombudsman believes that this should be the case also for the Court of Justice, which, in the course of its administrative activity, is in frequent contact with applicants who respond to calls for tenders. As the complainant rightly implied, the public's perception about the responsiveness and accountability of an EU institution, including the Court of Justice, should not be overlooked.

37. The Ombudsman also examined the arguments put forward by the Court as regards the existing review mechanisms.

38. The Ombudsman points out, first, that while the two external review mechanisms (the Court and the Ombudsman) do offer effective remedies, they do not however offer an *immediate* redress to a complainant's concerns, since these mechanism require a certain period of time.





Moreover, an internal review mechanism can also enable the administration concerned to provide, where possible, an immediate remedy and thus avoid any unnecessary recourse to the EU courts or to the services of the Ombudsman.

**39.** As regards, second, the mechanisms set up by the Financial Regulation and its Rules of Application referred to by the Court in its opinion (see point 30 above), clearly they are very useful in enabling the contracting authority to take appropriate measures to deal with a complainant's grievances. The Ombudsman believes however that their effectiveness would be enhanced by making them part of a **formalised internal review procedure**.

**40.** A third argument by the Court was that the complainant was able to address her concerns in writing to the Court and to receive a reply from the Court. The Ombudsman notes that, while the complainant used this possibility, the Courts' reply of 28 April 2014 was not entirely satisfactory. For instance, in the case of two of the complainant's arguments, the Court stated merely that they "*appear [ed] unfounded*" without explaining why this was so. The Ombudsman believes that the fact that complainants can write to the Court (and expect a reply) is not as useful as is a formal review mechanism. In the Court's view, its replies to requests and complaints that it receives, including those related to procedures for the award of public contracts, satisfy the precondition of having first made the "appropriate administrative approaches" [9] to the Court before complaining to the Ombudsman. However, the Ombudsman believes that, since citizens or other persons must first allow the institution concerned the opportunity to deal with their grievance, before complaining to the Ombudsman, it makes sense that institutions should have a **formalised internal review procedure**. A formal review procedure provides the best guarantee that the institution will listen to, and engage with, the review requester.

**41.** The Ombudsman agrees with the Court that it had no legal obligation, in its capacity as a contracting authority, to provide an internal review mechanism. In any case, this was not a situation in which the Court had no mechanism at all for dealing internally with complaints. Thus, the Ombudsman does not consider that the complainant's allegation merits a finding of maladministration against the Court. However, the Ombudsman believes that the Court's practice in handling complaints concerning tender procedures, such as in the present case, could be improved.

## **Allegation that the tender procedure failed to guarantee anonymity and related claim**

### **Arguments presented to the Ombudsman**

**42. The complainant** argued that the fact that the test translations were not anonymised before their evaluation constituted a breach of the principle of equal treatment and non-discrimination.

**43.** In its opinion, **the Court** stated that the EU legislature has not imposed a rule of anonymity





in public procurement procedures, including a negotiated procedure. Accordingly, anonymisation of the tenders submitted in the negotiated procedure used in this case was not a precondition for the procedure's legality. The Court further pointed out that, since the tendering specifications did not provide that the tenders - of which the translation tests formed an integral part - had to be anonymised, there was no basis for the complainant to expect such anonymisation. Moreover, the Court stressed that the complainant did not explain in what way she was treated differently from the other tenderers placed in a situation comparable to hers, or in what way she was in a situation different from that of the other tenderers. On the contrary, since no test translation of any tenderer was anonymised, the complainant was treated in exactly the same way as the other tenderers. Finally, the Court argued that, if the complainant wanted to suggest that the test translations were not marked impartially, she did not put forward any tangible evidence in that regard.

**44. The complainant** made no observations in this respect.

## The Ombudsman's assessment

**45.** The Ombudsman understands from the Court's opinion that all tenderers appear to have been treated in the same way, that is, having their identity disclosed. This is so because, in negotiated procedures, as in the present case, all the tenderers are known so that the contracting authority consults the tenderers of its choice who satisfy the selection criteria, and negotiates the terms of their tenders with one or more of them. Since the complainant did not explain in what way she was treated differently from the other tenderers who were placed in a situation comparable to hers, or in what way she was in a situation different from that of those other tenderers, the Ombudsman has no reason to think that the complainant was discriminated against.

**46.** What the complainant implied is that, because of this lack of anonymity, the integrity of the marking exercise was not fully guaranteed. Thus, the complainant's allegation raises more the question of the objectivity and impartiality of the evaluation of the translation tests rather than that of the application of the non-discrimination and equal treatment principles.

**47.** In this respect, the Ombudsman notes that the Court relied, once again, on the absence of a legal provision requiring it to anonymise the translation tests. The Ombudsman points out that, even in the absence of a specific obligation to anonymise tests in a negotiated procedure, it may be, in certain circumstances, good administrative practice to choose to do so. Anonymisation of tests can help in ensuring fair, objective and impartial assessments and the equal treatment of all the tenderers. Such steps may also help avoid any suspicion of partiality or favouritism.

**48.** Such circumstances may exist where bidders are already well known to the evaluators. This occurs where certain bidders already provide services to the contracting authority and where the



evaluators' regular daily work with the contracting authority gives them knowledge of the quality of the work **already** provided to the contracting authority by the bidders. In such circumstances, there is at least a risk that the evaluators might be influenced, when evaluating bids, by their perception, be it positive or negative, of the previous work of the bidders.

**49.** In the case at hand, the complainant has not demonstrated that the lack of anonymisation had an adverse impact on the assessment of her tests. Specifically, the complainant has not argued that any evaluator had formed a prior view of the quality of her work. The Ombudsman also notes that the Court provided convincing explanations, based on the results of the tests carried out in the tender procedure, as regards the marks given to the complainant. The Ombudsman thus does not find any maladministration in relation to this allegation.

**50.** Nevertheless, the Ombudsman considers that, as the complainant claimed, the Court could improve its tendering procedures and thus help avoid situations like this one. Thus, in a case like the present one, the Court could anonymise the translation tests for the purposes of the assessment made by the markers during the evaluation process.

## Conclusion

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

**The Ombudsman finds no maladministration by the Court of Justice.**

The complainant and the Court of Justice will be informed of this decision.

## Suggestions for improvement

**The Court of Justice, when acting in its capacity as a contracting authority, should (i) require internal evaluators to sign and date the evaluation sheets of tests, (ii) set up an internal review mechanism for dealing with complaints by unsuccessful applicants and (iii) anonymise the tests of tenderers for the purposes of the assessment made by the internal evaluators during the evaluation process.**

Emily O'Reilly

Strasbourg, 31/08/2016

[1] In a negotiated procedure, the contracting authorities consult tenderers of their choice who



satisfy the selection criteria and negotiate the terms of their tenders with them. In the case at hand, where a contract notice was published, candidates sent requests to participate (first stage of the procedure). Based on the evaluation of their capacities, the candidates judged to be the most capable of performing the contract were invited to submit tenders (second stage of the procedure).

[2] Article 4.3.1 (Minimum quality level) of the tendering specifications provided that the quality of test translations which are given a quality mark of less than 50 out of 100 will be considered unacceptable, and those tenders will be rejected.

[3] Regulation (EU, EURATOM) No 966/2012 on the financial rules applicable to the general budget of the Union. This Regulation has been amended by Regulation (EU, EURATOM) 2015/1929 of the European Parliament and of the Council of 28 October 2015.

[4] Article 159 of the Rules of Application.

[5] In this respect, the Court referred to the judgment of 24 April 2013 of the General Court in case T-32/08, *Evropaïki Dynamiki v Commission*, paragraph 30.

[6] In this respect, the Court referred to Article 116 of the Financial Regulation and Articles 17(1) and 166 of the Rules of Application. According to these provisions, where the award procedure has been subject to substantial errors or irregularities, the contracting authority shall suspend the procedure and may take whatever measures are necessary, including the cancellation of the procedure. Where such defects come to light after the contract has been awarded, the contracting authority may refrain from concluding the contract, suspend its performance or, where appropriate, terminate it.

[7] This Article provides that any natural or legal person may, under certain conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

[8] See the Ombudsman's decision closing the own-initiative inquiry OI/8/2013 (available at: <http://www.ombudsman.europa.eu/fr/cases/decision.faces/en/59392/html.bookmark> [Link]), where the Ombudsman underlined that such a review procedure should cover the following three situations which should give rise to a full re-evaluation of a tender: (i) if an applicant puts forward evidence of procedural errors, for example, if it is clear that a step in the procedure has been overlooked; (ii) if an applicant puts forward evidence of factual errors; or (iii) if an applicant puts forward evidence of a manifest error of assessment.

[9] Article 2(4) of the Ombudsman's Statute.